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LELAND STANFORD JUNIOR UNIVERSITY

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**INTERNATIONAL
CIVIL AND COMMERCIAL LAW**



INTERNATIONAL CIVIL AND COMMERCIAL LAW

AS FOUNDED UPON THEORY, LEGISLATION,
AND PRACTICE

BY

F. MEILI

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DELEGATE OF SWITZERLAND TO THE HAGUE INTERNATIONAL CONFERENCES

*TRANSLATED AND SUPPLEMENTED
WITH ADDITIONS OF AMERICAN AND ENGLISH LAW*

BY

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LONDON: MACMILLAN & CO., LTD.

1905

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Set up and electrotyped. Published May, 1905.

✓ 191274

Y9A9B11 08078478

Norwood Press
J. S. Cushing & Co. — Berwick & Smith Co.
Norwood, Mass., U.S.A.

TRANSLATOR'S PREFACE

SINCE the translation of the works of Savigny and von Bar upon the Conflict of Laws or International Private Law ("*Internationales Privatrecht*"), readers of the English language have had no opportunity to acquaint themselves with the theory and practice upon the subject which prevails outside their own immediate jurisdictions, — more especially on the Continent of Europe. Recently a number of events have transpired to introduce changes of far-reaching consequence in the doctrines recognized for the solution of legal conflict. Among the most important of these events may be cited the enactment of the German Civil Code with its Introductory Act, which came into force on January 1, 1900, the Japanese statute of 1898 upon the application of the laws in general, the Swiss statute of 1891 regulating the conflict of laws in detail, and, finally, most important of all, the International Conferences of The Hague of 1893, 1894, 1900, and 1904, in which most of the countries of Europe participated.

Although neither the United States nor England sent delegates to these conferences, considerable attention in both countries has been drawn to the treaties already ratified, as well as to those which are in draft. In England a body of jurists have appealed to their government to join in the deliberations of the conventions. In the United States the American Bar Association has evinced its interest by inviting the author to address the Congress of Law at the Louisiana Purchase Exposition upon the four conferences already held. It would seem doubtful whether either of the jurisdictions is prepared to join the treaty unions at this time, but it is not at all unlikely that at least delegates will be sent from both countries to future conferences.

In view of the new impetus which has thus been given to the study of International Private Law throughout the world, and the changes which have lately been made in the positive law of many

countries upon that subject, a new work dealing with this topic and outlining these movements in their proper perspective is timely. That this task should have been undertaken by a jurist of Switzerland is not surprising, since there, on account of its federal system, its limited territory, and central position among the nations of Europe, the doctrine of the conflict of laws has reached a high state of development. The Swiss statute of 1891 indicates this development, and is frequently discussed by the author. As this legislation represents the most detailed system of positive statutory law that has been enacted for the regulation of conflicts in private law, it will no doubt be found full of suggestion and interest to American and English lawyers.

It may be in point to recall that Continental jurists are inclined to deal with these problems from the philosophical point of view, and to attempt, as far as possible, to work out a logical system. The author has followed this precedent to some extent, but has taken care to note any divergence between theory and practice. In view of the increasing commerce and intercourse between the Old World and the New, and the consequent increase in international litigation, part of which, at least, must be prosecuted in the courts of the Old World, it is believed that the present work will prove serviceable to both the practitioner and student.

There is another noticeable difference in the treatment which the Continental jurist gives to the subject of International Private Law from that which our own authors accord to it. With us it is merely a branch of jurisprudence, and serves as a heading for a certain group of questions which occupy the attention of the courts. In Europe it constitutes also a branch of political science, as it deals with certain problems of sovereignty and the relations of the individual to the state. This results partly from the conception there so widely accepted, that the bond which unites the individual with his native state remains effective even in his private relations, though he has entered the territory of a foreign state. Many of the topics dealt with in the present work may therefore well occupy the attention of the student of comparative politics.

In the supplements of American and English law appended to the author's paragraphs, I have endeavored to state briefly and without discussion or argument, the law recognized in those jurisdictions, upon the principal points dealt with by the author.

They are in no sense intended as a full exposition of the law upon the topics treated, but have been added in order to complete the comparative nature of the work. Beyond this my object has been to produce a faithful translation of the author's treatise. The English text follows the German as closely as possible, and such omissions and changes as occur have been made with the consent of the author. Some terms which have been rendered literally may seem at times unfamiliar, but I have refrained from adopting terms peculiarly American or English where they would tend to import a meaning quite foreign to the original. I have also had in view the advantage accruing, at least in this branch of law, from the use of the same word or its equivalent, in order to express the same idea in all languages.

It is with pleasure that I acknowledge my obligations to Mr. George Winfield Scott of Washington, for some valuable suggestions.

A. K. K.

ZURICH, November, 1904.

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NOTE. — Authorities upon Commercial Law and the Law of Bills and Notes will be found at the heads of §§ 160, 181, and 200 *infra*.

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INTERNATIONAL CIVIL AND COMMERCIAL LAW

INTRODUCTION

INTERNATIONAL PRIVATE LAW IN GENERAL

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A. Corsi, *Studi di diritto internazionale privato* (1900).

Scipione Gemma, *Propedeutica al diritto internazionale privato* (Bologna, 1899).

Jitta, *La méthode du droit international privé* (The Hague, 1890).

Id., "Das Wesen des internationalen Privatrechts," in *Archiv für öffentliches Recht*, xiv, pp. 301-327. Then v. Bar, *id.*, xv, pp. 1-49, and reply by Jitta, p. 564.

Niemeyer, *Zur Methodik des internationalen Privatrechts* (Leipzig, 1894).

Triepel, *Völkerrecht und Landesrecht* (1899), pp. 20-26.

Kahn, "Über Inhalt, Natur und Methode des internationalen Privatrechts," in *Ihering's Jahrbücher für die Dogmatik des bürgerlichen Rechts*, 2d series, iv, pp. 1-87 (also published separately).

Meili, "Die Doctrin des internationalen Privatrechts," in *Zeitschrift für internationales Privat- und Strafrecht*, i, pp. 1-23 and 135-170.

Id., "Das wissenschaftliche Problem des internationalen Privatrechts," in *Österreichisches Centralblatt für die juristische Praxis*, xv, pp. 193-222.

I. ITS SCOPE

It is characteristic of modern times, that the legal relations of persons are not confined within the boundaries of any single nation. Man has become, as it were, an international subject of law. We are at the present time able to say, without exaggeration, that commerce is carried on with the greatest facility between the different parts of the world. Subjects of different nations intermarry. Contracts and other obligatory relationships are entered into outside the land in which the parties are citizens or are domiciled. Persons die and leave estates beyond the land of nationality or domicile. Legal instruments are executed in foreign lands between citizens of the same or different countries. Property is owned or possessed by persons alien to the territory in which it is situated. In all these cases, the laws of the different nations relating to Persons, Domestic Relations, Things, Obligations, and Succession are brought into a kind of international relationship with each other.

Besides the conflicts in these branches, which, in the terminology prevailing on the Continent of Europe, constitute the Civil Law, there is the possibility of conflicts in other branches of law, *e.g.* in Procedure, by the prosecution of suits by aliens or non-residents in local courts; in Bankruptcy, by their participation in local proceedings; in criminal matters, by breaches of the penal laws. These conditions must be regulated by certain objectively clear legal rules which it is the task of legislation and judicature to discover and establish.

1. The science of International Private Law did not originate in modern times, though it is only during the past few decades that it has attained its present significance. Of course, even in ancient times, international relations existed, especially by reason of maritime commerce, but man has become cosmopolitan only through the modern efficient means of intercommunication. These, coöperating with the tendency to lay aside former narrow rules of international law, have lifted the individual out of the confines of the internal state and have permitted him to enter legal relationships in the most diversified forms with the subjects of other nations, however distant. We have entered upon a period in which the relationships of society are most complicated because of the increase in interna-

tional intercourse, the diversification of industry, and the aggregation of population in great centres. To harmoniously adjust these relationships is in part the problem of our science.

2. In modern times, international business is equally, if not more important than that which is conducted in the interior, and the legal complications which result from it deserve equal attention. A clear and informative science of international law has never before been so necessary. Instead of this, however, the doctrines upon the subject are largely fragmentary, and it is not even clear how we shall circumscribe the domain of the material in hand.

3. International Private Law in its broadest sense (*i.e.* including criminal law and general procedure) is concerned with the same questions as are considered when dealing with domestic private law and procedure, though, of course, the legal point of view is a different one. The problems which confront us internationally are approached from two directions, viz. : —

1. in how far aliens, sojourning or domiciled in the local state, are specifically subject to its laws, and in how far they remain subject to the laws of their own country ;
2. in how far citizens of the local state, sojourning or domiciled in foreign countries, are specifically subject to laws there in force, and how far they remain subject to the laws of the local state.

For example, the law of Switzerland distinguishes the private legal relations existing between : —

1. an alien locally with a Swiss ;
2. an alien locally with another alien ; here we can subdivide the relations into those between : —
 - (a) an alien belonging to State A
 - and*
 - (b) an alien belonging to State B,
 - or*
 - (c) two subjects of the same state ;
3. a Swiss in a foreign state with another Swiss ;
4. a Swiss in a foreign state with an alien.

II. DIVISION OF THE SUBJECT-MATTER

When we are dealing with legal questions of an international character, it is necessary, in order to obtain clear conceptions, to retain the classification followed with regard to the internal law.

International law can and must be divided in the same manner as we divide the internal or domestic law. The following subdivisions thus suggest themselves :—

- (a) *International Public Law.*
- (b) *International (or External) Private Law*, to which belong Civil, Commercial, and Maritime Law and the Law of Bills and Notes.
- (c) *International (or External) Civil Procedure.*
- (d) *International (or External) Criminal Procedure.*

To this might also be added International Administrative Law. Confer, *e.g.* :—

Ullmann, "*Des commissions sanitaires internationales dans la guerre*," in *Revue de droit international*, xi, pp. 527-531.

Id., "*La lutte internationale contre les épidémies de la guerre*," in *Revue générale de droit international public*, iv, pp. 437-445.

Id., *Völkerrecht*, 2d ed., pp. 7-9.

2. It is almost universally agreed that International Law is divided into the two groups of International Public and International Private Law, but it is not clear exactly how much is contained within the scope of each. This alone is sufficient to explain the divergent classifications and manifold definitions.

III. NOMENCLATURE

1. Formerly the term "conflict of statutes" was employed. The title "foreign law" also occurs. Thoel applies the phrase "conflict of coördinating legal rules." Savigny speaks of the "broader dominion of the law" or else of "the local jurisdiction of the rules of law." English and American jurists, as for instance Story, Wharton, and Dicey, speak of the "conflict of laws." In this respect they accord with older authorities upon the subject. Rivier is inclined, even now, to give this term the preference. French authors use the term "*droit international privé*," and this name has also been adopted by certain English and American jurists, such as Westlake and Phillimore. It is also employed by German, Italian, Spanish, and Swiss authorities, although in Germany there still seems a certain amount of hesitation. In the reports of the decisions of the German Imperial Court, the term which first occurs is, "the local application of the law"; then

parenthetically the term "conflict of statutes" crept in, and finally the independent phrase "International Private Law."

This name still meets with opposition in some quarters. It originated with Bentham, who was the first to speak of "international law." He was manifestly pleased with his philological discovery, as he accompanied it with the words, "This term is new, but easy of comprehension." Bekker, in his work on the coupon litigation of the Austrian railways (1881, p. 56), says that the old name of "conflict of statutes" gives a wrong conception, while the newer term "International Private Law" does not make the boundary sharp enough. E. Cimbali, in "*Di una nuova denominazione del cosiddetto diritto internazionale privato*" (2d ed., Rome, 1893), proposes the terminology "*diritto privato et diritto penale dello straniero*," but this thought is neither new nor commendable. Cimbali undertakes to apply the term "*diritto internazionale privato*" to those rules which regulate the private legal relations of states between themselves, such as in the purchase and sale of territories, governmental loans, and other commercial transactions. He is opposed for sound reasons by Fr. Kahn in his article in *Ihering's Jahrbücher für Dogmatik* (xi, 2d ser., iv, pp. 4-5). The need in that department for a separate branch of law is scarcely great enough.

Vareilles-Sommières, in "*La synthèse du droit international privé*" (vol. i, pp. xxxi-xxxii), thinks that it is to be regretted that the name "*droit des étrangers*" or "*droit pérégrinal*" has not been adopted. Lainé, however, in his essay, "*Considérations sur le droit international privé à propos d'un livre récent*" (1900, p. 14), properly replies, that especially the term "*droit pérégrinal*" would not be accepted by anybody; "it would imply a false analogy between the peregrines of the Roman world and the aliens of the modern."

2. The term "International Private Law" is indeed not entirely satisfactory, as the following objections may be urged against it:—

- (a) The name takes for granted that there is already in existence an established law or code applicable to the international private legal relations of individuals. It creates the illusion that there is, or ought to be, a universal authority to issue laws common to the various states.

- (b) The term "private law" is here employed in another sense from that in which it is usually used in domestic law, because the execution of civil judgments, procedure in general, and the prosecution of foreign criminals are questions very commonly conceived as within the domain of International Private Law.

3. Some jurists have opposed placing questions of Criminal Law under the heading of International Private Law. Again, nearly all are agreed that many questions of Procedure do not fall in this category. When used to cover all these topics, the term is carelessly employed to designate the law which refers to the private individual in international matters, whether referring to his private life proper, that is to say, Civil Law in its modern significance; to the manner of prosecuting legal remedies, that is to say, International Civil Procedure; or Criminal Law (including Criminal Procedure) as applicable to foreign criminals, that is to say, International Criminal Law and Procedure.

Lainé concludes that International Private Law should be divided into different groups of topics; viz., into Civil, Commercial, and Criminal International Private Law. In describing his position he defines as follows:—

It is that law which regulates the relations of the states in regard to the conflict of laws.

From a different point of view Lainé defines as follows:—

It is that law which, after the nationality of the individual has been fixed, regulates the relations of the states in regard to the legal standing of their subjects and the effect of the judgments of their courts.

This is unsound, as it applies only where the national law is the adopted standard. In order to define the topic in its *broadest* terms, the following would seem preferable:—

It is the science of international statutory and legal conflicts in regard to private persons, or the science of statutory and legal conflicts in international private relations.

We thus return to the old nomenclature "*conflictus*" or "*collisio legum*," but in doing so, we must exclude its application to those conflicts which arise in International *Public* Law. In speaking of the entire domain we may employ the term "conflict of laws in

international relations," and in order to restrict its application to *private* conflicts we may say, "the conflict of laws in the international legal relations of private persons."

In order to define our topic in its more *precise* signification, we propose the following :—

It comprises that complex of essentially private legal rules and principles which divide off the jurisdiction and the laws of various nations, when private legal relations produce, or seem to produce, competition or conflict among such laws.

Or as an alternative :—

International Private Law comprises that subject-matter of private law, of which the rules are so coördinated, that one and the same private legal relationship may or must be referred to the local laws of one or more other independent jurisdictions, in order to determine its origin, validity, effect, and termination.

In order to simplify international jurisprudence, it would certainly be desirable to have the terminology in all modern languages the same, and for this reason it would seem best to retain the already widely accepted term "International Private Law," keeping in mind, however, that it embraces only International Civil and Commercial Law, the latter including also the Law of Bills and Maritime Law. It is this classification which has been adopted in the present work.

Approaching the subject of International Civil and Commercial Law, are those of International Civil Procedure and International Criminal Law and Procedure, but these divisions are just as much to be kept separate as the parallel divisions of domestic law. The separation from Criminal Law is not only necessary methodically but also practically, because International Civil and Commercial Law does not deal with the sovereignty of states. It is in no sense a part of International Public Law. It is true, the divisions are connected to a certain extent, but only in about the same degree as *Domestic* Public Law with Private Law.

4. The principal difference between International Public and International Private Law lies in the following :—

- (a) In International *Public* Law ("droit des gens"; "Völkerrecht") the subjects are the various *nations*, and the legal relations existing between *them* are studied. It comprises those

rules which regulate and establish the rights and duties of commerce-protecting states over against each other.

The subjects of International *Private Law* are *private persons*. This term includes also juristic or artificial persons and sometimes the state itself.

- (*b*) The tribunal which determines disputes is usually different in the two cases. In matters of International Private Law, the courts are almost always competent, while up till now, no organic tribunal has been created for determining disputes in International Public Law (excepting, to a limited extent, the new *Cour permanente d'arbitrage* at The Hague).

When it is said that International Public and International Private Law touch one another frequently, what is meant is that considerations of the former may play a part in regard to the latter. We particularly emphasize the following points:—

- (*a*) In International Private Law, the præ-judicial question presents itself at the outset of most cases, as to what legal position is to be assigned to aliens.
- (*b*) The practical realization of claims in International Private Law often presupposes the existence of international treaties.
- (*c*) International treaties, the particularly authoritative source of the law, frequently deal with both public and private interests at the same time.

NOTES

1. L. Challande, in his treatise "*Das völkerrechtliche Rechtsverhältnis*" (*Archiv für öffentliches Recht*, xvi, p. 575), says that the direct and unconditional denial of any system of International Public Law seems to have gone out of style.

2. Jellinek, "*Das Recht des modernen Staates*," vol. i (1900), p. 120, says that the term "international law" is ambiguous and misleading and that it were better to speak of "interstate law" than of "*jus inter gentes*" or "*nationes*."

3. The various nomenclature of the subject is also given by Dicey, "*Conflict of Laws*," pp. 14-15, e.g. "local limits of law," "intermunicipal law," "the extra-territorial effect of law," "the extraterritorial recognition of rights." Holland also proposes the term "*droit privé (ou selon la cas, penal) extraterritorial*" (*Revue de droit international*, xii, 581). Dicey, p. 14, thinks "the expression 'international private law' is no doubt a slight improvement on 'private international law,' as it points out that the rules which the name denotes belong to the domain of private law."

4. The *Deutsche Juristische Zeitung*, 1902, pp. 25-26, proposes in future to say, "the doctrine of the local change of laws," because it is a system indicating to the judge when to exchange the local for a foreign code. This new proposal is apt to lead us beyond the bounds of serious discussion.

§ 2. Private Associations for the Development of International Private Law.

Two societies have thus far been founded which have engaged themselves with the detailed study of International Private Law. Both are scientific associations without official character. A brief mention of their organization and objects is in point, as their labors are frequently referred to in the following pages.

I. *The Association for the Reform and Codification of the Law of Nations, now known as the International Law Association.*

The society was founded at Brussels in 1873, and its work was already at that time considered coöperative with that of the Institute of International Law (see *infra*). Its membership is entirely unrestricted. It has published the reports of its conferences. Its constitution is to be found in "A Summary of the Proceedings of the 3d Annual Conference held at The Hague" (London, 1875, pp. 25-29). As amended in 1887 (Report of the 13th Conference, pp. 22-24), it provides that "the objects of the association shall be the reform and codification of the law of nations." It seeks to further the progress of International Law in its practical application and in public opinion. Sessions have been held at many of the chief cities of Europe and one in America, in 1899, at Buffalo. The proceedings are conducted partly in English and partly in French, as the members have the option of using either language.

II. *The Institute of International Law.*

G. Moynier, *L'Institut international* (Paris, 1890).

Iwanowsky, *L'Institut de droit international et ses rapports avec les sociétés juridiques des divers pays* (Odessa, 1894).

Stoerk, *Die Litteratur des internationalen Rechts, 1884-1894* (1896).

Rivier, *Principes du droit des gens*, i, p. 33.

The Institute of International Law was founded at Ghent in 1873 and is in the nature of a closed corporation or international academy. The following [translated] extract of the by-laws will show with what purpose it was established (Art. I):—

Its object is to promote the progress of international law :—

1. in endeavoring to formulate the general principles of the science in conformity with the legal conscience of the modern civilized world ;
2. in striving toward a gradual and progressive codification of international law ;

3. in obtaining official sanction of principles recognized as being in harmony with the needs of modern society ;
4. in contributing, to the extent of its competence, toward the maintenance of peace, or the observation of the laws of warfare ;
5. in examining the difficulties which arise in the interpretation or application of the law, and, in the proper case, in giving legal opinions in doubtful or controverted cases ;
6. in promoting, by publications, by instruction of the public, or by other means, the triumph of those principles of justice and humanity which should govern the relations of peoples among themselves.

Sessions of the Institute are held at intervals of not less than one nor more than two years. The proceedings are conducted in French and are reported in the *Revue de droit international* and in the "*Annuaire*" of the society. A "*tableau général*" was published in 1893 upon the organization of the Institute, its work, and personnel during the first two decades of its existence.

§ 3. The Distinction between International Private Law and Comparative Jurisprudence.

Kahn, "*Bedeutung der Rechtsvergleichung mit Bezug auf das internationale Privatrecht*," in *Zeitschrift für internationales Privat- und Strafrecht*, x, p. 99. Meili, *Institutionen der vergleichenden Rechtswissenschaft. Ein Grundriss* (Stuttgart, 1898).

I. Though a contrary system prevails in France, the science of Comparative Jurisprudence should not be identified with that of International Private Law. The objects which they pursue are entirely different.

The aim of Comparative Jurisprudence, on the one hand, is to determine the following questions :—

1. What is the nature of the legal material at hand ?
2. In what manner are the systems of law of the various countries related to each other ?
3. Under what general points of view or into what divisions of law may the material be grouped ?

The science of Comparative Jurisprudence aims to discover the *similarities* in the economic and legal bases of the laws of different countries, and labors toward a gradual unification, so far as this is deemed possible and desirable. I have attempted to collate the

material upon this subject in my work upon the "Institutes of Comparative Jurisprudence."

International Private Law, on the other hand, deals essentially with *differences* in the private law of the various countries and the so-called *conflicts* arising from these differences. It therefore does not involve substantive legal propositions at all, but merely their sphere of application.

The greater the success of Comparative Law through unification, the smaller will be the domain of conflict, and the narrower the scope of International Private Law. Both sciences support each other beneficially; the correct solution of the great controversies of International Private Law can only be accomplished by the comparative study of the foreign systems. Naturally, the more advanced the knowledge of foreign law becomes, the more effectively can it be applied to the individual cases.

II. It must be recognized that too sharp a separation of the two sciences is in no wise necessary or useful. It is rather more methodical than practical not to undertake legal comparisons in connection with the conflict of laws. The latter problems can often be understood only by means of concrete illustration.

NOTE

J. Piccard, in his treatise, "*Le droit et sa diversité nécessaire d'après les races et les nations*" (*Journal de droit international*, xxviii, p. 417), says: "The mosaic of foreign laws tints the earth like the conventional colors of an atlas, constituting what may be called the 'jurisphere.'" He objects to the term "comparative law," and proposes the term "legal criticism" ("*critique juridique*").

§ 4. The Establishment of a Universal System of Law.

Zitelmann, *Die Möglichkeit eines Weltrechts* (Vienna, 1888).

J. Ofner, *Der Grundgedanke des Weltrechts* (1889).

E. Moulin, *Unité de législation civile en Europe* (Paris, 1865).

Brocher, *Revue de droit international*, iii, p. 413.

G. Pays, *Le contrat international* (Paris, 1886).

Larroque, *De la création d'un code de droit international et de l'institution d'un haut tribunal juge souverain des différends internationaux* (Paris, 1875), pp. 125 and 126.

Asser, "*Droit international privé et droit uniforme*" (*Revue de droit international*, xii, pp. 1 et seq.).

L. Levy, *International Law, with Materials for a Code of International Law* (London, 1887).

Nippold, "*Internationale Rechtseinheit auf dem Gebiete des Privatrechts*," in *Zeitschrift für internationales Privat- und Strafrecht*, v, pp. 473-492.

I. In order to overcome the great theoretical difficulties presented by the modern problems of International Private Law, there has been much discussion concerning the establishment of a universal system of private law, or at least of a general European civil law. It is true, that even without mentioning the great historical epoch of the reception of the Roman law in Europe, other examples of the acceptance of foreign law have occurred. Thus in Egypt, French law was adopted; in Japan, first English, then French, and now German private and public law have been adopted; in South Africa, Dutch private law as it existed in the last century has been taken as the standard. It must not be forgotten that the well-known plausible fiction of a Holy Roman Empire existed as an element favorable to the reception of the Roman law in mediæval Europe, and, so far as concerns the modern precedents just mentioned, one can hardly predicate permanent creations through the obtrusions of these strange systems. All in all, the idea of a universal system of law is too chimerical and should be abandoned.

II. Like propositions of law can develop gradually only in respect of institutions which are genuinely cosmopolitan in nature. But even there, the proper *tempo* of history must be observed. In branches of law where race characteristics play a part, the establishment of a universal system is out of the question.

III. An international unification would seem possible and desirable in the following directions:—

1. in the law of bills;
2. in commercial law, in respect of shares of stock, checks, and bearer-bonds;
3. in the law of trademarks and patents;
4. in railroad law;
5. in postal, telegraph, and telephone law;
6. in maritime law.

No unification can be properly accomplished without a careful comparison of laws; from this point of view the periods of conflict and friction can be looked upon as merely the natural preface to a later unification. The idealistic though comfortable idea of a universal system of law is actually prejudicial to the science, because it causes a reactionary effect through its very extravagance.

IV. The idea of establishing international courts of arbitration for private disputes is equally unfeasible. Doubtless it were both possible and desirable to submit certain debatable questions of International Private Law, generally connected with private interests, to an international *ordo judiciorum*. However, it is injurious to the cause for the apostles of peace to pursue indiscriminately the idea of an international tribunal for *all* matters, *e.g.* also for political differences. Here, too, the development of the possible is hindered by mere dreams. It is, on the other hand, not only desirable, but imperative to constitute a court of appeal for the settlement of such differences as concern the interpretation of treaties, particularly those in which real private legal interests are involved.

NOTE

Upon the present permanent international tribunal (*Cour permanente d'arbitrage*), having an international office at The Hague, compare: Gareis, "*Institutionen des Völkerrechts*," an abbreviated text-book of positive public international law in its historical development and present form (2d ed., 1901, p. 222; and appendix, p. 288); also F. W. Holls, "The Peace Conference of The Hague" (1900).

§ 5. The Hague Conferences and Other Attempts at Codifying a System of International Private Law.

I. PRIVATE ENDEAVORS

Another method of solving the legal difficulties presented in international intercourse is to enact a complete code, designed to point out which law shall be applicable in an international conflict of a private legal character. This procedure recognizes the divergence of legislation as an indisputable fact, and seeks to determine what system of law shall control in a given case. Similar attempts have been made in International *Public* Law by Bluntschli in his work: "*Das moderne Völkerrecht der christlichen Staaten als Rechtsbuch dargestellt*" (3d ed., 1878), and by Pasquale Fiore in "*Il diritto internazionale codificato e la sua sanzione giuridica*" (3d ed., 1901).

The following works are the results of the endeavors thus far made by individuals in the field of *private* law:—

1. De Domin-Petruschewecz, "*Précis d'un code du droit international*" (Leipzig, 1861), 2d part, Nos. cciii–ccxviii.

2. Dudley Field, "Outlines of an International Code" (New York, 2 vols., 1872). This work has been translated into French by Rolin under the title: "*Projet d'un code international*," and into Italian by Pierantoni under the title: "*Prime linee di un codice internazionale*."
3. "Draft of an International Code," published by the English Society for the Advancement of the Social Sciences. Bulletin of the *Société de Législation Comparée* (Paris, 1872), i, pp. 24-32; iii, pp. 300-304.

Important services have been rendered in this line by Dicey in the preparation of a paragraphical combination of the rules of International Private Law prevailing in England ("Digest of the Law of England with Reference to the Conflict of Laws," with notes of American cases by John Bassett Moore).

II. GOVERNMENTAL ENDEAVORS

1. Some of the nations of Europe have entered into treaty relations separately with one another concerning certain isolated topics of International Private Law and Procedure. We do not now refer to the Hague treaties (see *infra*). The term "Conventional International Private Law" might well be employed to express the idea of private law based upon public law.

2. The South American nations have, upon two occasions, undertaken complete codifications by treaty.

- (a) A congress was called at Lima, November 9, 1878, in which the following nations participated: Argentine, Bolivia, Chile, Costa Rica, Ecuador, Peru, and Venezuela. A treaty was elaborated upon International Civil and Criminal Law and Procedure. Confer: —

Contuzzi, *Diritto internazionale privato* (Milan, 1890), pp. 556-558.

Neubauer, Goldschmidt's *Zeitschrift für Handelsrecht*, N. F., x, pp. 546-583.

Meili, *Die Kodifikation des internationalen Civil und Handelsrecht*, pp. 91-103.

- (b) A congress met for the same purpose at Montevideo in 1889, in which the following nations participated: Argentine, Bolivia, Brazil, Chile, Paraguay, Peru, and Uruguay. It elaborated separate treaties upon each of the following topics: —

- (aa) international civil law;
- (bb) international commercial law;
- (cc) the law of copyright for authors and artists;
- (dd) international penal law;

- (ee) international law of procedure ;
- (ff) merchants' and manufacturers' trademarks ;
- (gg) patents for inventions ;
- (hh) the practice of the learned professions.

An English translation of these treaties is to be found in the Reports of the International American Congress (Washington, 1890), pp. 876-933. Confer also :—

Segovia, *El derecho internacional privado y el Congreso Sud-Americano* (1889).

The proposed treaties are printed in the original at pp. 190-265.

Diez de Medina, *Breves observaciones a los tratados sancionados por el Congreso internacional Sud-Americano* (1889). Publication ordered by the government of Argentine (Buenos Ayres, 1894).

Journal de dr. i., xxiii, pp. 440, 699 ; xxiv, p. 632.

Heck in *Zeitschrift für internat. Privat- und Strafrecht*, i, pp. 324-339.

Contuzzi, *supra*, pp. 334 *et seq.*

The Pan-American Congress of the North, South, and Central American Republics, which was held at Washington from October, 1889, to April, 1890, recommended that the respective governments cause certain of the treaties elaborated at Montevideo to be studied (*viz.* those on Civil Law, Commercial Law, and the Law of Procedure), so as to be able to report within a year "whether they do or do not accept the said treaties, and whether their acceptance of the same is absolute or qualified by some amendments or restrictions." But these treaties were never adopted in bulk even by the South American nations, although they were all accepted by Uruguay alone, October 5, 1892 (*Droit d'auteur*, 1893, vi, p. 32). The treaty upon literary and artistic property appears to have been ratified also by Argentine, December 6, 1894, and is therefore in effect between these countries (*Droit d'auteur*, 1897, x, p. 4). With these exceptions, they still remain merely projects. Confer :—

International American Conference. Reports of Committees and Discussions thereon (Washington, 1890).

Amédée Prince, *Le congrès des trois Amériques*, 1889-1890 (Paris, 1891).

3. In 1870, negotiations took place between France and Spain with a view to the draft of a treaty upon International Private Law and Procedure, but no practical results accrued.

4. Italy began diplomatic negotiations upon this subject as early as 1867. They were renewed under the leadership of Mancini in 1881, but without success.

5. As early as 1874, the government of the Netherlands was at work upon a plan for a congress of nations to discuss the advisability of a treaty for the universal execution of judgments. The congress never materialized.

6. Not discouraged by its previous failure, the government of the Netherlands renewed its efforts, this time with the aim of regulating a wider range of topics in International Private Law. It finally succeeded.

(a) Almost the whole of Europe was represented at the first conference, which took place at The Hague in 1893. The following thirteen nations participated :—

- | | | |
|--------------------|-----------------|------------------|
| 1. Austro-Hungary, | 6. Italy, | 10. Roumania, |
| 2. Belgium, | 7. Luxemburg, | 11. Russia, |
| 3. Denmark, | 8. Netherlands, | 12. Spain, |
| 4. France, | 9. Portugal, | 13. Switzerland. |
| 5. Germany, | | |

Confer : —

Asser in *Revue de dr. i.*, xxv, pp. 521-548.

Lainé in *Journal de dr. i.*, xxi, pp. 1-25, 236-255.

Cahn in *Zeitschrift für internat. Privat- und Strafrecht*, iv, pp. 1-10.

Breukelman, "De conferentie over het internationaal privaatrecht," in *Themis*, 1894, pp. 161-176.

Meili, "Der erste europäische Staatenkongress," in the *Allgemeinen oesterr. Gerichtszeitung*, 1894, No. xxi, p. 169.

Guillaume, *Le mariage en droit international privé et la conférence de la Haye* (Brussels, 1894).

(b) In 1894 another conference was held, in which Sweden and Norway were also represented. Confer : —

Asser in *Revue de dr. i.*, xxvi, pp. 349-377.

Cahn in *Zeitschrift für internat. Privat- und Strafrecht*, v, pp. 1-24.

Breukelman in *Themis*, 1894, p. 443.

Torres Campos, *Las conferencias de derecho internacional privado de El Haya* (Madrid, 1895).

Lainé in *Journal de dr. i.*, 1895, xxii, pp. 465, 734.

(c) The government of the Netherlands invited the nations to a new conference for 1899, which did not take place until 1900. Confer : —

Buzzati, *Intorno al "projet de programme" della terza conferenza di diritto internazionale privato* (Turin, 1899).

Meili, *Das internationale Privatrecht und die Staatenkonferenzen im Haag* (Zurich, 1900).

Actes de la troisième conférence de La Haye pour le droit international privé.

- (d) The fourth conference was held at The Hague in 1904. Upon this occasion the Empire of Japan was also represented.

It is to be noted that neither England nor the United States of America were represented at any of the conferences. England excused its non-appearance because of "the peculiar nature of English law." The reason given is rather a strange one in view of the fact that it is precisely the *differences* in the laws of the various nations which form the basis for the calling of the conferences. The fact in itself is greatly to be regretted, as the representatives of the Anglo-American legal system would have constituted a counterpoise to the exaggeration of the importance of the *lex patriae*.

The work of the international conferences should properly be divided into three groups of subjects, which, on principle, should be kept separate, viz. : —

1. International Civil Procedure,
2. International Private Law,
3. International Bankruptcy Law.

Although the Law of Procedure and of Bankruptcy do not come within the scope of the present work, a brief summary of the work of the Hague conferences upon all of the above topics is necessary, in order to have a proper understanding of the results thus far accomplished.

1. As a result of the first two conferences, a treaty was ratified between the fifteen nations represented at the second conference, bearing the following title: "Convention to establish common rules concerning certain matters of international private law referring to civil procedure." The duration of the treaty was five years, *i.e.* until April 27, 1904, but as no state gave notice of termination before that time, the treaty is extended until April 27, 1909, in accordance with an express provision. The conference of 1904 elaborated certain improvements which practice under the treaty proved to be necessary. The following is a summary of the convention : —

- (a) *The communication of official legal acts.* Throughout the territory in which the treaty is in effect, the communication of legal acts (in the broadest sense of the term) has been elevated to a formal obligation in international law.

- (b) *Commissions to take testimony* must be executed by a nation at the demand of any other nation within the union, provided its sovereignty or safety be not endangered, or the inquiry concern matters which the nation whose assistance is required deems a state secret.
- (c) *Costs and security for costs.* Alien security, or that which a plaintiff is obliged to give by reason of being a foreign subject, or of having no residence in the local state, has been abolished within the treaty territory. *Judgments for processual costs* may be executed in any nation of the treaty union.
- (d) *Procedure in the case of poor persons.* Foreign subjects are admitted to the privileges of poor persons, equally with natives.
- (e) *Imprisonment for debt* is permitted as against foreign subjects only in the event that it is permissible to be exercised against natives.

2. The Hague conferences also elaborated the following treaties dealing with Family Law, viz. :—

- (a) upon entrance into marriage (Appendix I *infra*),
- (b) upon divorce and separation (Appendix II *infra*),
- (c) upon the guardianship of minors (Appendix III *infra*).

Each one of these topics is treated of in a separate convention. They were all accepted by the following nations, ratifications being exchanged on the first day of June, 1904 :—

- | | | |
|-------------|-----------------|--------------|
| 1. Belgium, | 4. Luxemburg, | 6. Roumania, |
| 2. France, | 5. Netherlands, | 7. Sweden. |
| 3. Germany, | | |

The treaties therefore went into effect between them on the 31st day of July, 1904 (*Rev. de droit international*, new series vi, p. 517).

The following nations have also given indication that they will join the conventions : Austro-Hungary, Italy, Spain, and Portugal.

As separate chapters are devoted to detailed discussion of these treaties (§§ 73, 80, 85, *infra*), no further mention of them is made at this time.

The conferences also elaborated draft treaties upon other subjects of Family Law, viz. :—

- (a) upon the guardianship of major persons (interdiction).
- (b) upon the effects of marriage on the rights and duties of spouses in their personal relations and on their property.

These projects are not yet ripe for acceptance and will be the subject of consideration at future conferences. They are discussed at § 159 *infra*.

The Law of Succession has been given the most detailed examination at all of the conferences, and a number of draft treaties have successively been elaborated. The final draft bears the title: "Project of a convention upon the conflict of laws in the matter of succession and wills." It will be discussed at future conferences.

In regard to the Law of Bankruptcy, the conferences did not consider it advisable to propose treaty relations by one common convention between all the participating nations. A treaty was therefore elaborated at the conference of 1904 which is to serve as a model for such nations as desire to enter into relations with one another upon this subject.

III. THE PROSPECT FOR THE FUTURE

The difficulty of accomplishing treaty regulation of these questions is easily understood when we remember that each nation considers itself sovereign in regard to them, and that the rules of law to be laid down are intended to be placed *above* the organs which, in each country, possess the power of legislation.

As Civil and Commercial Law represent a neutral zone in jurisprudence, certain portions of these topics will gradually come into the sphere of *international* legislation. Either a partially uniform system of law will be worked out, or the rules of conflict will be unified. Fully as much ought to be accomplished by treaty in International Private Law as in International Public Law. In fact, difficulties are met with in regard to the latter which are not presented by the former. Not without reason does Bluntschli remark (*Memoirs*, iii, p. 359), in commenting on the Russian proposal which led to the Brussels Conference of 1874, that the codification of International Law was always most difficult when the laws of warfare are under discussion. The Peace Conference of 1899 certainly confirmed this fact.

It might be said, however, as to both branches, that in modern times it were better to speak of mutual "interdependency" than of "independency." Cf. Lorimer, "The Institutes of the Law of Nations" (1883), i, p. 364, and J. Fusinato, *Per il XXXV anno d'insegnamento di Filippo Serafini* (Florence, 1892), pp. 6-9.

In America and England

Although neither the United States nor Great Britain took part in any of the conferences held at The Hague (with the exception of that upon International Public Law held in 1899, known as the "Peace Conference"), a tendency is discernible among lawyers and jurists of both countries to influence their respective governments to join in these deliberations. There is no sufficient reason why the Anglo-American sphere of jurisprudence should keep aloof from a movement supported by the rest of the civilized world, the object of which is to advance the administration of justice in private matters by placing it upon an international basis.

Participation in the conferences would in no way obligate these Jurisdictions to adopt any of the treaties, although they are in a position to accept at least some of them. Thus the one dealing with procedure represents neutral ground, the substantive law of the particular nations playing no rôle whatever. It is imperative that justice shall triumph irrespective of territorial boundaries. Up to the present, however, there has been no official bond of communication between the judicial organs of the states composing the family of nations.

The situation is not so clear in respect of the other treaties, as the doctrines upon the conflict of laws in America and England are, as we shall see, widely divergent from those prevailing on the Continent of Europe, where the national law of the parties is of preponderating importance. But even this does not always represent an insuperable barrier. For example, the treaty upon marriage (Art. 1), though making the national law the primary standard, permits it to give way to any other system (such as the law of the domicile or that of the place of celebration) if the national law so provides (see Appendix I).

At the annual meeting of the International Law Association at Antwerp, in 1903, a paper was read by Sir Walter Phillimore, a judge of the High Court of Justice, expressing the desirability of having Great Britain participate in the conferences. A resolution was proposed by Sir William Kennedy, a judge of the same court, to the effect that the association "should take steps respectfully to lay before the British government the points dealt with in that paper," with a view to its participation in the conventions.

Although not referring in terms to America, the resolution was seconded by Professor Gregory, Dean of the Faculty of Law of Iowa University, and the discussion showed plainly that it was the sense of the assembly that the desirability existed as to that Jurisdiction also. The resolution was unanimously adopted (Report of 21st Conference, pp. 85-93). The American Bar Association also showed its interest in the work of the Hague conferences by inviting the author to address the Congress of Lawyers and Jurists held at the St. Louis Exposition in September, 1904, upon the subject of these conferences. See also the article of Simeon E. Baldwin, "The New Code of International Family Law," in *Yale Law Review*, June, 1903.

§ 6. Review of the Rules of Conflict prevailing in the Various Countries.

Niemeyer, *Positives internationales Privatrecht*. Part I: "*Das in Deutschland geltende internationale Privatrecht*" (Leipzig, 1894). This work contains a review of the authorities.

Neumann, *Internationales Privatrecht in Form eines Gesetzentwurfs nebst Motiven und Materialien* (Berlin, 1896), pp. 149-278.

Meili, *Die Kodifikation des internationalen Civil und Handelsrechts* (Leipzig, 1891). A collection of materials.

I. We must not forget that the treaties are controlling in the first instance. Sometimes they cover only a single subject-matter, *e.g.* the international law of succession. In such a case, recurrence must be made as to the rest, to the general rules of International Private Law. If a legislative act expressly excepts the treaties, it reserves not only such treaties as exist at the time of the passage of the act, but also such as are ratified later.

II. The systems by which the rules of conflict are regulated, vary greatly.

1. There are nations which lay down the rules in special laws. To this group belong: Holland and the Dutch Indies, Italy, Switzerland, and Japan.

2. There are nations which lay down their rules of conflict fragmentarily throughout the private law. France, with its *Code civil*, belongs to this group.

Rules of conflict are often to be found in codes of procedure.

3. There are nations which enact no provisions whatever upon the rules of conflict. To this group belong England (with a single

exception to be mentioned later), the United States, Sweden, Norway, and Denmark.

4. The legislature of the German Empire has restricted the subject to the Introductory Law or *Einführungs Gesetz*. This is not a commendable precedent.

The first draft of the German Civil Code spoke of the "local application of the rules of law"; the second draft, of the "application of foreign law" (in opposition to local law). Finally, the Introductory Law was adopted without any attempt at special designation; the title of the first division (§§ 1-31), "General Provisions," is as colorless as it is unmeaning.

III. Statutes upon rules of conflict, as far as they go into detail at all, treat of the different subjects out of which International Private Law is constituted, without dividing them sharply. For example, the Italian "*Disposizioni*" contain penal provisions and rules of procedure in addition to private law proper. Provisions relating to procedure are contained in the Swiss Federal Statute relating to the Civil Rights of Persons Domiciled and Sojourning ("*Bundesgesetz betreffend die civilrechtlichen Verhältnisse der Niederlassenen und Aufenthalter*"). For the sake of brevity, we will refer to this statute hereafter as *N. & A.*

IV. The following summary indicates where the rules of conflict of the various countries are to be found:—

1. In Italy

Important rules of conflict are contained in the prefatory part of the *Codice civile* of 1865, which is entitled: "*Disposizioni sulla pubblicazione interpretazione ed applicazione delle leggi in generale*" (Arts. 6-12).

P. Fiore, *Delle disposizioni sulla pubblicazione interpretazione ed applicazione delle leggi* (Naples, 1891).

Contuzzi, *La codificazione del diritto internazionale privato* (Naples, 1887).

Fusinato, "*Il principio della scienza italiana nel diritto privato internazionale*," in *Archivio giuridico*, xxxiii, p. 521.

Detailed information in regard to the legislation and practice in Italy may be found in:—

C. Norsa, *Revue de dr. i.*, vi, 247; vii, 194; viii, 401, 627; ix, 78, 207.

Esperson, *Journal de dr. i.*, vi, 329; vii, 245; viii, 206; ix, 154, 270; x, 263; xi, 158 and 251.

Already at this time I desire to call attention to the importance of Art. 58, *Codice di commercio*, in regard to Commercial Law.

2. In France

The provisions upon the rules of conflict are contained in the *Code civil*. The following articles are of particular importance: Arts. 3, 4, 6, 7, 11, 13, 14, 15, 16, 170, 171, 726, 912, 999, 1000, 2123, 2128.

Foelix, *Traité de droit international privé*, 4th ed., i, No. 32.

Massé, *Le droit international*, 2d ed., i-iv.

Aubry et Rau, *Cours de droit civil français*, 4th ed., i, §§ 76-79.

Zachariä-Puchelt, *Handbuch des französ. Civilrechts*, 6th ed., i, §§ 31-32. Zachariä-Crome (8th ed., 1894), §§ 30 and 31, pp. 106-118.

Barazetti, *Einführung in das französische Civilrecht* (Frankfort, 1889), pp. 154-252.

The "*titre préliminaire*" of the French *Code civil* ("*de la publication des effets et de l'application des lois en général*") was originally considered in France as an introduction to all codes under Napoleon, and not merely to the *Code civil* (Zachariä-Crome, *Handbuch des französ. Civilrechts*, 8th ed., i, p. 85).

3. In Monaco

Confer:—

Jolivot, "*Du régime légal des immeubles possédés par des étrangers dans la principauté de Monaco*," in *Journal de dr. i.*, 1887, p. 720.

Rolland, "*Condition juridique des étrangers dans la principauté de Monaco*," *Journal*, 1890, p. 239.

4. In the Netherlands

Asser-Cohn, *Das internationale Privatrecht*, pp. 14, 22.

Asser, *Revue de dr. i.*, pp. 113-118.

Hingst, *Revue de dr. i.*, xiii, pp. 401-417; xiv, pp. 414-434.

The rules of law are contained in general provisions for legislation ("*Wet houdende algemeene bepalingen van wetgeving*," 1829). See Van Drumpt, *Commentar* (Utrecht, 1878); C. W. Opzoomer, *Aanteekening op de wet houdende algemeene bepalingen der wetgeving*, 4th ed. (The Hague, 1884). French translation by Tripels: *Les Codes Néerlandais*, p. 57. The most important provisions are Arts. 3, 6, and 9.

A special law exists for the Dutch Indies ("*Algemeene bepalingen voor Nederlandsch Indie*," 1847, with supplement, 1876). Art. 16 is especially important.

5. In Belgium

Refer to:—

Haus, *Du droit privé qui régit les étrangers en Belgique ou droit des gens privé considéré dans des principes fondamentaux et dans ses rapports avec les lois civiles des Belges* (Ghent, 1874).

A. Halot, *Traité de la situation légale des étrangers en Belgique* (1900).

A. Rolin, i-iii.

1. Laurent, at the request of the Belgian government, worked out a draft bill for the revision of the French *Code civil*, in force in Belgium (*Avantprojet de Révision du Code civil*, vol. i, Brussels, 1882). In this first volume, Laurent proposes some important rules of conflict (*titre préliminaire*, sections ii, iii, iv). He also submits his arguments (vol. i, pp. 22-168).

2. The amendment of the Belgian Revisional Committee (Arts. 3-14).

Revue de dr. i., xviii, pp. 442-501.

Lainé, *Bulletin de la société de législation comparée*, xxi, pp. 315-341, 383-413, 449-470, 525-567.

6. In the Congo Free State

The controlling law is of date February 20, 1891: "Of aliens and the application of the laws."

Confer:—

M. Vauthier, *Revue pratique de droit international privé*, i, pp. 179-185.

7. In the German Empire

The rules are contained in Arts. 7-31 of the Introductory Act to the Civil Code in force since January 1st, 1900.

(a) The earlier drafts are printed in the work of Meili, *Geschichte und System des internationalen Privatrechts im Grundriss*, pp. 198-209.

(b) Upon the provisions actually adopted confer: Keidel, "*Le droit international privé dans le nouveau code civil allemand*," in *Journal de dr. i.*, xxv, p. 867; xxvi, pp. 17, 239.

A. Rolin, "*Étude sur les dispositions de droit international privé du code civil de l'empire allemand comparé avec celles de certains projets récents et de certaines lois*," in *Revue de dr. i.*, xxx, pp. 188-219.

C. Barazetti, *Das internationale Privatrecht im bürgerlichen Gesetzbuche für das Deutsche Reich* (1897).

A. Niedner, *Das Einführungsgesetz vom 18 August 1896* (1899), pp. 10-81 (2d ed. 1901).

Dernburg, *Pandekten*, i, §§ 45-48 (6th ed.).

Id., *Das bürgerliche Recht des Deutschen Reichs und Preussens*, i, §§ 34-40 (pp. 88-104).

Windscheid-Kipp, *Pandekten* (8th ed.) i, §§ 34 and 35 (pp. 117-127).

Endemann, *Lehrbuch des bürgerlichen Rechts* (8th ed.), i, §§ 20-22.

This jurist remarks (vol. i, p. 84) that no very definite or clear regulation has been accomplished by these rules. He supplements this remark in Note 9 by stating that the provisions in question were only auxiliaries in certain important directions; they do not rest upon a uniform system and their contents are incomplete.

G. Planck (with Achilles, André, Greiff, Ritgen, Unzner), *Bürgerliches Gesetzbuch*, vi (1901), pp. 21-99.

Niemeyer, *Das internationale Privatrecht des bürgerlichen Gesetzbuchs* (1901).

G. Neumann, *Handausgabe des bürgerlichen Gesetzbuchs* (2d ed.), iii, pp. 1336-1379.

Id., "Prinzipielle Gesichtspunkte für das Verständnis der privatinternationalen Vorschriften des E. G." in *Beiträgen zur Erläuterung des deutschen Rechts* (edited by Gruchot, 46th year), pp. 67-99.

8. In Spain

The rules of conflict are contained in the Spanish Civil Code, promulgated anew with amendments, July 24, 1889, Arts. 8-11.

Confer:—

Lehr, *Éléments de droit civil espagnol*, i (Paris, 1880); ii (1890). See ii, pp. 31-34.

A. Levé, *Code civil espagnol traduit et annoté* (Paris, 1890).

Audinet, "Le droit international privé dans le nouveau code civil espagnol," in *Journal de dr. i.*, xviii, pp. 1106-1129.

Torres Campos, "Le droit international privé en Espagne," in *Revue pratique de droit international privé*, ii, pp. 45-59.

9. In Portugal

Provisions are contained in the Civil Code (1868, *Código civil português*), part i, book i, title v, Arts. 26-31.

10. In Austria

The rules are contained in §§ 4, 34, 35, 36, 37, and 300 of the Civil Code. Confer:—

Unger, *System des österr. allgem. Privatrechts* (4th ed., 1876), i, pp. 149-210. At p. 158 he says: "These few paragraphs do not in the remotest degree exhaust this complicated and extensive subject. A number of the most important questions are not even mentioned."

Von Püttlingen, *Handbuch des in Österr.-Ungarn geltenden int. Privatrechts* (2d ed., 1878), p. 19.

We shall see that the provisions of the Austrian statute, while not altogether in harmony with the modern development of the science, contain either special or general regulations for most of the cases arising in International Private Law, thus making unnecessary recurrence to the fictitious utterances of the so-called "natural law."

Kirchstetter-Maitisch, *Kommentar zum österr. allgem. Gesetzbuch* (4th ed., 1882), pp. 55-63.

Jettel, *Handbuch*, pp. 1-110.

Besides the provisions of the Civil Code, reference must be made to the Imperial Proclamation of August 9, 1854, upon procedure. Especially important are §§ 137-144 (succession) and § 183 (guardianship). Confer:—

F. Starr, *Die Rechtshülfe in Österreich gegenüber dem Auslande*. This is a collection of the treaties, statutes, ordinances, and rules of the Department of Justice, with comments. Cf. also *Nachlassbehandlung der Ausländer in Österreich* (Vienna, 1878).

J. Friedländer, *Das Verfahren ausser Streitsachen nach dem kaiserl. Patente vom 9 August, 1854* (12th ed., Vienna, 1896).

The statute of August 1, 1895, introductory to the law fixing the jurisdiction of the courts, contains the following provision (Art. viii, No. 3):—

"The provisions in regard to the jurisdiction of the local courts in respect of the estates of aliens, in particular §§ 22-25 and 140-144 of the Imperial Proclamation of August 9, 1854; further, those upon their competence in matters of the guardianship and curatory of aliens contained in § 183 of the said proclamation . . . remain undisturbed by this act."

11. *In Bosnia and Herzegovina*

Confer:—

Trigant-Geneste, "*Le droit international privé en Bosnie et Herzégovine*," in *Journal de dr. i.*, xviii, p. 776.

Peritch, "*De la condition juridique des Bosniaques et des Herzégoviniens en pays étranger*," *Revue de dr. i.*, 2d series, iii, pp. 50-74, 241-254.

12. *In Switzerland*

Confer:—

E. Roguin, *Conflits des lois suisses en matière internationale et intercantonale* (1891).

Rossel, *Manuel du droit fédéral des obligations*, pp. 33-36.

The rules of conflict are to be found in the following statutes :—

I. The Federal Statute of 1891 upon the Civil Rights of Persons, Domiciled and Sojourning (*N. & A.*), in force since 1892 (*N. F.*, xii, p. 369). This act regulates exclusively such divisions of international conflict as are expressly mentioned in it. Former concordances or cantonal laws treating of the same subject-matter are superseded (Art. 39). It treats of :—

1. the civil rights of Swiss subjects, domiciled or sojourning throughout Switzerland (Arts. 1–27) ;
2. the civil rights of Swiss subjects in foreign countries (Arts. 28–31) ;
3. the civil rights of aliens in Switzerland (Arts. 32–34). Art. 32 provides :—

“The provisions of this statute are expressly applicable to aliens domiciled in Switzerland.”

Mentha appropriately calls this statute “our little code of international private law” (*Bulletin de la société de législation comparée*, 1901, p. 367).

II. The Code of Obligations (*Obligationenrecht*). The only rules of conflict in this act are contained in Arts. 208, No. 2, 756, 770, 822–824, which treat of Commercial Law and the Law of Bills and Notes.

III. The Federal Statute of 1874 upon the Establishment and Authentification of Civil Relations and Marriage (*Feststellung und Beurkundung des Civilstandes und die Ehe*), containing the following provisions applicable to our subject :—

1. Art. 25, concerning the law of husband and wife and legitimacy. The Federal Constitution contains the same rules in Art. 54.
2. Art. 43, concerning the forum.
3. Art. 56, concerning suits by aliens.

IV. The Federal Statute of 1881 upon Personal Capacity to Act (*die persönliche Handlungsfähigkeit*). Art. 34 of *N. & A.* expressly reserves Art. 10, Nos. 2 and 3, of this law.

The first draft of a Civil Code for Switzerland (published 1900) attempts to regulate International Private Law by provisions scattered under the various headings. A few propositions are contained in the introduction. As it is proposed to separate the Law of Bills and Notes from the present Code of Obligations, and therefore also from the Civil Code, we would be compelled to seek the rules of conflict in three different places. Furthermore, the provi-

sions proposed are entirely amiss. I have criticised them in my work, "*Die Kodifikation des schweizerischen Privat- und Strafrechts*" (Zurich, 1901, pp. 108-122). It is much to be regretted that precisely this branch should have been so insufficiently treated. The clauses have received the almost unconditional approval of Marcusen (*Zeitschrift für internat. Privat- und Strafrecht*, xi, pp. 37-52), but I must say that I find his opinion incomprehensible.

13. *In Sweden, Norway, and Denmark*

Confer:—

Neumann, p. 37.

Lehr, *Éléments de droit civil scandinave* (1901), Nos. 23-30.

Nellemann in *Zeitschrift für internat. Privat- und Strafrecht*, i, pp. 104-107, 227-230 (Denmark).

14. *In Russia*

Refer to:—

Lehr, *Éléments de droit civil russe* (Paris, 1877), i, pp. 5-10; ii, 1900.

The Russian government itself admitted lacking adequate provisions upon International Private Law.

Neubauer, in *Zeitschrift für Handelsrecht*, N. F., xxi, p. 433.

Provisions are also found in the private law of Livonia, Esthonia, and Courland. Compare:—

Meili, *Kodifikation*, pp. 42-44.

Erdmann, *System des Privatrechts der Ostseeprovinzen, Liv-, Est- und Kurland* (Riga, 1889), i, pp. 49-65.

15. *In Servia*

The Servian Civil Code of 1844 contains rules of conflict in Arts. 6, 45, 47, and 53. Confer:—

Pavlovitch, in *Journal*, xi, pp. 5-28, 140-162; especially p. 12.

16. *In Montenegro*

The Code of Property contains rules of conflict in Arts. 5-9, 786-800.

17. *In Greece*

The statute of October 29, 1856, contains a few rules of conflict, Arts. 3 *et seq.* Confer:—

Αστυν Νομοθεσία, p. 164.

The proposed Civil Code of 1874 (*νομοσχεδίου ἀστικού Ἑλληνικοῦ κώδικος*) was greatly influenced by the Italian *Codice civile*, but the provisions relating to International Private Law remain the same as in the Code of October 29, 1856.

Confer:—

18. In Roumania

Suliotis, in *Journal*, xiv, pp. 430-436, 559-570.

G. Flaischlen, "*Revue de la jurisprudence roumaine en matière de droit international*," in *Revue de dr. i.*, xxvi, pp. 288-303.

D. Alexandresco, *Droit ancien et moderne de la Roumanie. Étude de législation comparée* (1897), pp. 3 *et seq.*

19. In Argentine

The Civil Code of the Argentine Republic contains rules of conflict in Arts. 1, 5-14, 409, 410, 1181, 3283, 3286, 3611, and 3612.

Asser, in *Revue de dr. i.*, v, pp. 591 *et seq.*

Daireaux, in *Journal de droit i. pr.*, xiii, pp. 286-298, 414-424.

Confer:—

20. In Peru

Pradier-Fodéré, in *Journal*, v, pp. 345-368, 577-595; vi, pp. 41-53, 250-270.

21. In Chile

Rules of conflict are contained in the Civil Code of 1855. Arts. 14-18, 997, 998. Confer:—

Neubauer, in *Zeitschrift für Handelsrecht, N. F.*, xxi, pp. 411 *et seq.* The provisions are printed in French in the *Bulletin de législation étrangère*, vii, pp. 508 and 509.

Confer:—

22. In Colombia

Champeau, "*De la condition des étrangers en Colombie*," in *Journal de dr. i.*, xxi, pp. 929-940.

23. In England and the United States

There are no statutory rules of conflict. An exception is constituted by the English Bills of Exchange Act (Art. 72), and, in America, by the Civil Code of Louisiana (Arts. 9 and 10).

The objection on the part of the courts to the application of

foreign private law is gradually disappearing, in obedience to the influence of better theory. The *dictum* of an English judge, "I never apply any other law than the English common law," has become obsolete.

Reference is again made to:—

1. The work of Wharton: "A Treatise on the Conflict of Laws" (2d ed.).
2. The work of Story: "Conflict of Laws" (8th ed.).
3. The work of Dicey: "A Digest of the Law of England with Reference to the Conflict of Laws," with notes of American cases by J. B. Moore (London, 1896).

Especially to be noted is the reasoning of Wharton in § 1:—

"Private international law is that branch of the law of a country which relates to cases more or less subject to the law of other countries. *It is a law and hence binding; but it is binding, so far as concerns England and the United States, not because it has been enacted as a code, nor because all its parts have been definitely settled by prior decisions, but because, like other parts of the common law, it is ascertained as a logical inference from the conditions of each case.*"

24. In Japan

I. The preparation of the Civil Code, so far as it treats of International Private Law, has been influenced by the new Italian School. Cf. Patrenostro, in *Revue de dr. i.*, xxiii, p. 184 and note 3 (wherein the provisions first proposed are printed in French).

II. The Statute of June 15, 1898, "upon the Application of the Laws in General," deals specially with our topic. This statute (*Ho-rei*) contains thirty articles which present the rules under three categories, viz.:—

1. As to the date of going into effect (Art. 1);
2. As to effect and signification of customs and practices (Art. 2);
3. As to the conflict of laws (Arts. 3-30).

The text of the rules upon International Private Law is printed:—

1. in French, as an appendix to the treatise of Yamada, "*Le droit international privé au Japon*," in *Journal de dr. i.*, xxviii (1901), pp. 632-639.
2. in German, in *Zeitschrift für internat. Privat- und Strafrecht*, xi, pp. 198-202. On pp. 202-204 is the proposed bill of 1891.

25. *In Siam*

A. Dauge, "*De la condition juridique des étrangers et de l'organisation judiciaire au Siam*," in *Journal de dr. i.*, xxvii, pp. 461, 704.

§ 7. The General Nature of Legislation upon International Private Law.

It may perhaps be to the purpose to make a few remarks here, bearing upon the whole subject of International Private Law. This will then dispense with the necessity of again recurring to it under each separate topic.

I. *Legislation varies greatly both in form and substance.*

1. In most systems, International Private Law, so far as any rules have been laid down at all, is both unsystematically as well as incompletely dealt with.

2. Usually no discrimination is made between : —

- (a) the position of the alien in the local state, and
- (b) that of the native citizen abroad.

Bearing upon Persons and the Family (Art. 6) and upon Succession (Art. 8), the Italian "*Disposizioni*" speak only of persons in general.

Art. 3 of the French *Code civil* treats merely of the status and speaks only of French subjects abroad.

In general we may start with the proposition that the rules of conflict fixed by a nation apply to private transactions of aliens domiciled in that country : —

- (a) with native citizens,
- (b) with other aliens, whether of the same or of different nationality.

There are exceptions to the rule. Whether the rules apply equally to native citizens domiciled or sojourning abroad must be decided for each individual case. It must not be forgotten that other countries also have the right to, and usually do, establish rules of conflict according to views of their own.

II. *The principles upon which legislation in the various countries is based differ materially.*

The struggle for supremacy lies mainly between the *domiciliary law* and the *national law*. We shall see later that, in many

branches, these two standards can be reconciled beneficially, and yet this idea has neither been enacted into positive law, except in a few instances, nor has it been exhaustively discussed in theory.

The two principles may be briefly denoted by the phrases :—

1. *lex domicilii*, and
2. *lex patriæ*; this term was first used by Ulpian, *lex* 3, § 1 *de muneribus* 50, 4 (see also Cujatius, *Observationes*, lib. xiv, cap. xii).

In addition to the two principal categories under which the rules of conflict may be grouped, there is also a third, according to which local law is applied to the relationships of all persons found within the territory of a state. This is the standard of *territorial law*.

How far-reaching the territorial rule is, when supported by legislation or practice in a country, is to be tested in each case. Thus it may or may not apply to the transactions of aliens (of the same or different nations) *amongst themselves*. The principle of comity also often enters in and mitigates the effect of the rule.

III. *The conditions established by the different nations, as prerequisite to the application of foreign private law, are expressed in various formulas, many of which do not coördinate.*

1. *Austria* supports the principle of reciprocity, as, for instance, in the Imperial Proclamation of 1854. In the case of an alien dying in Austria, leaving personal property there to be administered, the application of the law of the country to which the deceased belonged is made to depend upon whether that country *would respect the law of Austria*, in dealing with the personal property of one of its subjects dying abroad there.

With this, the standard followed, *e.g.* by Switzerland, does not in the least correspond. Swiss legislation establishes the proposition that property left by a Swiss, domiciled in Austria, shall be treated according to Austrian law, *provided the Austrian laws so require*.

2. The theory of *Germany* is that the national law shall apply to its citizens domiciled abroad in respect of certain matters (Introductory Act: Arts. 13, entrance into marriage; 14, personal relations of the spouses; 24, succession). The same theory applies conversely to aliens in Germany. On the other hand, German law will be applied to aliens in the following matters, if their national law

itself provides that the law of Germany shall be applicable (Art. 27):—

- (a) upon capacity to act (Art. 7₁).
- (b) upon capacity to marry (Art. 13₁).
- (c) upon matrimonial property (Art. 15₂).
- (d) upon divorce (Art. 17₂).
- (e) upon succession (Arts. 24 and 25).

The law of Germany is applied to aliens in these branches under the circumstance mentioned, although the Introductory Act (*E. G.*) regularly supports the *lex patriæ*. This will apply especially to such aliens, the law of whose country supports either the domiciliary or territorial theory. The purpose at the bottom of the German legislation is both comprehensible and practical, although not an ideal solution of the problem. It is based upon the fact that Germany has no real interest in being more solicitous to apply the national law than the particular foreign nation itself.

It is manifest that the effect of Art. 27, Introductory Act, makes the legal situation clear in regard to nations supporting doctrines of domiciliary and territorial law, *e.g.* England, United States, Denmark, Norway, Argentine.

As a further illustration, let us examine the situation between Germany and Switzerland.

- (a) The alien domiciled in Switzerland is *regularly* dealt with according to his national law in regard to :—
 - (aa) capacity to act (except in commercial matters, where the territorial law applies ; Art. 10₉, *Fed. Stat. Pers. Cap.*),
 - (bb) family relations (Art. 8, *N. & A.*),
 - (cc) duty of maintenance and support as between relatives (Art. 9, 2),
 - (dd) succession, provided the alien has designated the national law by will or contract for succession.
- (b) The alien in Germany is *regularly* dealt with according to his national law in regard to :—
 - (aa) capacity to act (except in commercial matters ; Art. 7, Int. Act),
 - (bb) capacity to marry,
 - (cc) matrimonial property,
 - (dd) divorce,
 - (ee) succession.

In *certain* respects, however, German law is applicable to Switzers domiciled in Germany. Art. 28, No. 2, *N. & A.* reserves the application of Swiss law to Switzers domiciled in foreign countries, *provided the foreign law is not made applicable by its own terms*, that is to say, when a sort of *negative* conflict arises. Now, the purpose of the German statute is to resign in favor of the alien's national law only when the foreign nation itself *undertakes to make its own law applicable*, that is to say, *affirmatively* supports the *lex patriæ* rule. This requisite is not satisfied by Swiss law in regard to:—

- (a) capacity to act,
- (b) matrimonial property,
- (c) succession, though the deceased may provide by will, that his national law shall apply (see *infra*, § 134).

On the other hand, German law does not apply in the following matters, as Switzerland has affirmatively enacted that the national law shall control:—

- (a) capacity to marry,
- (b) divorce.

A similar result is reached by Niemeyer (*Das internationale Privatrecht*, 1896, p. 28).

3. In *England* and in the *United States*, the controlling idea is the separation of immovables from movables throughout the whole of Civil Law. The law of the place of location, or the *lex rei sitæ*, is applicable to immovables absolutely and without exception. This cleavage of real from personal estate is followed throughout, no matter whether the question concerns property rights or rights *in personam*. Nor are these countries influenced by the Roman conception, according to which the estate of a deceased person descends to the heir as a unit (universal succession), irrespective of the kind of property which composes it.

Legislation in these countries does not designate what system of law shall be applicable in determining the rights and duties of their subjects domiciled or sojourning in foreign countries.

4. The *Swiss* statute, as we have seen, regulates directly only the legal position of aliens domiciled in Switzerland. Its provisions are applicable to Swiss subjects abroad, only in the event of the foreign law being applicable by its own terms (Art. 28,

No. 2). Where the domicile is in countries which support the national theory, *e.g.* Italy, France (in many directions), and the Netherlands, it is clear that national law will apply pursuant both to the national and the local systems. The condition that foreign law be applicable by its own tenor is fulfilled in the following states:—

- (a) in England and the United States, where the territorial and domiciliary doctrines prevail;
- (b) in Germany, as to the topics already indicated;
- (c) in certain Central and South American countries, where the statutes declare bluntly that aliens domiciled within the territory are subject to local law. Such a general provision does not always work a like result (*e.g.* Arts. 9 and 16, Statute of the Netherlands, of 1829, with which the statute of the Dutch Indies corresponds). It will depend upon the interpretation which the foreign state itself places upon such a legislative declaration.

Art. 32 of the Swiss statute states that the provisions contained in the act shall be applicable, by analogy, to aliens domiciled in Switzerland. This cannot refer to those provisions (Arts. 28–31) which deal with the native subject abroad, as no analogy is possible there. It refers only to so much of the act as regulates the relations of citizens of one canton, domiciled in another, viz. to Title I (Arts. 1–27).

§ 8. Peculiarities of International Private Law in Territories under Consular Jurisdiction.

Wheaton-Lawrence, *Commentaire sur les Éléments du droit international*. Vol. iv is entitled "*Étude sur la juridiction consulaire et sur l'extradition*."

Report of the Eighth Conference of the International Law Association, pp. 27 *et seq.*

v. Holtendorff, *Handbuch des Völkerrechts*, iii, pp. 689–753.

Martens-Skerst, *Das Konsularwesen und die Konsularjurisdiction im Orient* (1874).

Féraud-Giraud, *De la juridiction française dans les échelles du Levant et de la Barbarie. Étude sur la condition légale des étrangers dans les pays hors chrétienté* (2d ed., Paris, 1866).

Pélissié du Rausas, *Le régime des capitulations dans l'Empire ottoman*, i.

F. Contuzzi, *La istituzione dei consolati ed il diritto internazionale europeo nella sua applicabilità in Oriente* (1885).

I. Mohammedan countries have for centuries occupied a unique position with regard to the civil and commercial legal relations of

European aliens. The national law of such persons is applied, almost without restriction, under the protection of consular tribunals. The special jurisdiction thus established belongs properly to the topic of International Civil Procedure, but at this point it is necessary to note the following:—

1. The reason for this exceptional condition of affairs, whereby the national law is exclusively applied in private legal matters, is that the points of view in law and the customs of Mohammedan peoples differ so greatly from those of Europeans.

2. National law (in connection with consular jurisdiction) is applied for the benefit of the subjects of the Powers in:—

- (a) China, *Revue de dr. i.*, xi, p. 387.
- (b) Turkey, although admitted into the European family of nations in 1856. Consular jurisdiction exists also *for the benefit* of Greece. This point, so important to Greece, was again recognized by treaty after the late war.
- (c) Persia and Siam.

Consular jurisdiction existed formerly also in Japan, but it has now been abolished. Foreigners living in Turkey and the Orient can elect the nation under the protection of which they desire to place themselves.

3. Upon the question as to what objective system of private law shall be applied by the consular courts, we must refer to the legislation of the Powers.

- (a) There is a German statute upon consular jurisdiction, of date April 7, 1900 (printed in Neumann's hand edition of the Civil Code, iii, p. 1579, and in Goldschmidt's *Zeitschrift für Handelsrecht, N. F.*, 50, p. 197). According to this law, the Civil Code applies in matters which it covers, and the Prussian State Law as it existed at the time of the act, in other matters generally (§ 19). The nationality of those under consular protection is determined according to the provisions applicable to aliens in Germany.
- (b) In Belgium there is a statute "*sur les consulats et la juridiction consulaire*" of 1851, with amendments of 1875 and 1883.
- (c) In Switzerland, provisions are to be found in the Instructions of the Federal Council of February 14, 1866; also in the Circular Letter of July 11 of the same body, containing a clause upon the application of substantive law providing that the *lex patriæ* shall govern in the absence of circumstances making the local customs more appropriate.

4. The fact that a citizen of one nation places himself under the consular protection of another nation does not alter his status as regards the application of private law.

- (a) It is only the *jurisdiction* that is affected. (Decision of French Consular Court in Alexandria, December 21, 1900, *In re Dietliker*.) To this effect is also Féraud-Giraud in "*De la juridiction française dans les échelles du Levant*," 2d ed., ii, pp. 80-82: "the person under protection does not change his nationality; it does not denationalize him; he remains an alien . . ."
- (b) Where a person formerly under one consular jurisdiction changes to another (*e.g.* where a Frenchman formerly under the jurisdiction of his own country voluntarily alters the protection under which he lives to that of Italy or America), the jurisdiction alone is changed, not the substantive law.

II. The Institute of International Law (1882-1883) drafted a project for a treaty regulating consular jurisdiction (*Annuaire*, vi, p. 280; vii, p. 190).

American and English Consular Jurisdiction

The treaty between the United States and Turkey (1862) has the effect of conceding to the United States the same privilege in respect of consular courts which is enjoyed by other Christian nations. Similar relations exist with regard to China and other semi-civilized countries (see pamphlet of Dudley Field, "On the Applicability of International Law to Oriental Nations").

In carrying the treaties into effect, Congress provided that the statutes of the United States shall apply whenever, by their nature, they are designed to effectuate the treaties. Where the statutes are not thus adapted, or are insufficient to give a proper remedy, the common law and the law of equity and admiralty shall apply. If these prove insufficient, the ministers accredited to these countries may issue rules and decrees having the force of law, to supply the defects (U.S. Rev. Stats. § 4086). It has been claimed that the intention of the statute is to refer to the *English* common law, for the reason that there is no federal common law, in contradistinction to that of the separate states (M. B. Dannel, "*Les cours consulaires des États-Unis en Chine*," in *Jour. de dr. i.*, xxix, p. 287. See also *Dainese v. Hale*, 91 U.S. 13).

That consular jurisdiction is provisional only, was decided in *Mahoney v. U. S.*, 10 Wall. 62, where the Supreme Court held that the extra-territorial powers of a consul residing in Algeria expired when Algeria became a French province.

The structure of the consular courts in Egypt is discussed in "Foreign Relations of the United States," 1879, pp. 988 *et seq.* The former consular courts have now been superseded by the *Tribunaux Mixtes* (see *infra*, § 9).

The English statute is somewhat ambiguously expressed. "It is expressly provided in the orders relating to Siam, to China, . . . and Corea, to the Ottoman dominions and to the Western Pacific Islands, that the civil and criminal jurisdiction of her Majesty conferred by those orders shall be exercised (subject to the orders), *as far as circumstances admit*, upon the principles of and in conformity with the common law, the rules of equity, the statute law and other law for the time being in force, in and for England, and with the powers vested in, and according to the principles and procedure observed by and before Courts of Justices and Justices of Peace in England" (Tarring, "British Consular Jurisdiction in the East," p. 60).

§ 9. International Private Law in Relation to Egypt.

I. Egypt occupies a unique position among the nations of the Orient. The Powers have come to an understanding both as to the substantive law to be applied and to matters of jurisdiction. So-called "*Tribunaux Mixtes*" have been created and constitute the basis of a sort of improved consular jurisdiction. These courts are the subject of more detailed discussion in my work upon International Civil Procedure (Zurich, 1904).

A series of international codes have been elaborated and adopted by the Powers for use in these courts, consisting of a civil code, a code of commerce, a code of maritime commerce, and codes of civil and commercial procedure. They are applicable:—

1. in transactions between subjects of different foreign nations ;
2. in transactions between aliens and natives.

A provision upon International Private Law proper is to be found in Art. 4 of the "*dispositions préliminaires*" to the Civil Code, which provides as follows :—

"Questions relative to the status and capacity of persons, and the matrimonial status, to rights of natural, or testamentary succession, and to guardianships and curatories, rest within the jurisdiction of the judge of the personal statute."

According to this rule, the principal questions of law are referred to the *lex patriæ*. The article is curiously framed; it confounds the law and the forum, though its real meaning is clear.

§ 10. The Bearing of Theoretical Discussion upon Positive International Private Law.

v. Bar, i, p. 13.

Kahn in *Ihering's Yearbooks*, vol. xl, p. 52.

I. In view of the fact that the rules of conflict so often prove to be fragmentary, the relation of science to International Private Law is unique. In no department of jurisprudence are we in an equal degree compelled to deal with theory.

The litigated cases arising in international matters are so varied that each separate circumstance must be independently considered; a single factor may change the whole situation and make a different law applicable.

The task of the judge in questions of conflict is a very delicate one, especially when he is called upon to decide a question upon which the courts of the foreign nation whose law he is applying are not in accord themselves.

1. It is not surprising that the problems of International Private Law develop so much divergence at the present time. The various countries have till now proceeded separately and have established certain few principles, which often, by their own terms, demonstrate their fragmentary character. Upon these, the courts were compelled to build further, and it would have been a miracle had a uniform system of rules developed.

In respect of legislation and doctrine, we must distinguish the following national groups, viz. : —

- (a) the group supporting the doctrine of *lex patriæ* as advanced by the new Italian School. To this group belong Italy, France, and now also Germany;
- (b) the group of the domiciliary law. To this belong Switzerland (with certain reservations), Denmark, Norway, and, in certain directions, England and the United States;
- (c) the group of territorial law, which represents the English theory and practice upon many questions.

2. It is doubtless true, as Zitelmann concludes in his work on International Private Law (i, p. 2), that there is no uniform system of International Private Law; that, on the contrary, there are as many variations as there are systems. For this reason we must examine every question which touches our subject, separately for each country, if we desire to arrive at positive law. At the same time our point of view should always be cosmopolitan, so as to satisfy the demands of commerce, as well as to make the science juridically more complete. As long as legislation and the treaties fail to meet these requirements, the judge must act in each case as a kind of modern *prætor*. A drastic need of reconciling the existing divergencies is evident, and if it be true that there is *now* a tendency toward a uniform system of rules in International Private Law, it is indeed as necessary as it is natural.

When contradictory rules exist, having equal claim to application (according to the state which determines the issue), the result is often dependent upon where the property which forms the basis of the dispute is located, or upon which forum finally gets jurisdiction of the parties. The statement of Keller (*Pandekten*, § 12, end) is still correct, that often the law of the stronger controls, the stronger being that country in which the transaction finds its legal effect by way of state aid, judgment, and execution. It is just this fact which points to the serious necessity of an understanding between the nations upon the principal questions.

3. The International Conferences at The Hague have, in my opinion, placed the development of International Private Law upon the right track. The following facts have thus been brought to full recognition:—

- (a) that the rules of private law of the civilized nations are upon the *same* level;
- (b) that solutions *must* be found which shall suitably regulate the affairs of private persons living under a judicious cosmopolitan system;
- (c) that the detail must be examined, and that *general* rules, principles, and axioms will not suffice.

The ideal to be strived for is this: that by virtue of generally recognized rules of conflict, a transaction when once completed shall be judged pursuant to one and the same system of law, over the whole civilized world—entirely without consideration as to

where action in regard to it is brought. It is to the government of the Netherlands that the credit belongs, for all time, of having pointed out and opened to other nations the road leading to the advancement of International Private Law along these lines.

The treaties bearing upon our topic must be carefully edited, and those already existing should not always be taken as patterns. In fact, sometimes they can best serve to show how *not* to formulate them. For example Fedozzi, in his treatise: "*Gli enti collettivi nel diritto internazionale privato*," p. 83, says in regard to certain treaties of Italy with Servia and Roumania: "*questo regolamento . . . non costituisce per noi che una prova di più del come i trattati siano spesso fatti da uomini coltissimi in tutto fuorchè nelle materie giuridiche.*"

II. There has been much discussion as to the way the gaps in the law of conflict should be filled out.

There are several theories, viz. : —

1. that the source of International Private Law should be solely and without exception the native law (Gierke, *Deutsches Privatrecht*, i, p. 213);
2. that this should be the source only as to provisions for the competence of native law, while for the provisions as to the competence of foreign law, the latter alone shall be authoritative (Schnell, in *Zeitschrift für internat. Privat- und Strafrecht*, v, p. 377; v. Bar, *id.*, viii, p. 178);
3. that the native law should be competent to provide the sphere of application of both local and foreign law, providing the case presents certain relations to the local state (Neumann, *Deutsche Jurist. Zeitg.*, 1898, p. 372);
4. that the rules of conflict should be derived principally from internal sources, but that subsidiary reference should be made to International Public Law (Zitelmann, i, p. 199).

The truth is that the gaps in the internal law of conflict are in the first instance to be filled up by reference to its own general significance and spirit. This simple fact was overlooked by Wächter, and upon his authority the mistake has been carried farther. Legal analogy can and must rest upon the basis of the positive rules already established in International Private Law. When, for lack of these positive rules, analogy fails, we are compelled to recur to theory, not that upon local substantive law, but that which has been developed upon the rules of conflict. In

doing this we should adopt the theory which tends to approach nearest to the positive laws of conflict.

Nor will this alone suffice. Treaty regulations must be undertaken between the individual states, at least on certain topics. A cosmic *tractandum* must be solved cosmically. There is no doubt that each nation has the right to set up special principles to be applied by its own judges in local as well as in external matters, but then every other nation has the same right. If all the nations were to follow this principle, the complications would be unbearable. The gaps should be filled up by treaty provisions, drawn according to a careful consideration of the requirements of private persons in their international relations.

In America and England

It is to be noted that theory plays a much more important rôle in the development of International Private Law in the countries of Continental Europe, than in England and the United States. This results from the difference between systems of law based primarily upon statutory codes, and one based upon judicial precedent. English and American authors restrict themselves, for the most part, to the decided cases, without attempting to deduce principles which may logically coördinate with the systems of law prevailing in other countries, or which may ultimately lead to a uniform system of International Private Law.

Continental theory, on the other hand, has ever the end of future legislation, or treaty provision, in view. Therefore, International Private Law is treated as a comparative science, not, as in England and America, from the sole standpoint of the internal or local law. It is for this reason that we are compelled to turn to the works of Continental authors for an exposé of the systems of law prevailing in all the civilized nations at once. It is in this way only that we can obtain, in proper perspective, a view of how the various systems are co-related.

As stated by the author, the doctrines of International Private Law have not been established by legislative act in America or England. It need not be concluded, however, that the legal policy of either country is permanently against this method of procedure. In proof of this, the following events may be cited. The English

Bills of Exchange Act was enacted in 1882. It contains a detailed system of International Private Law upon the subject of Bills and Notes (*e.g.* § 72). We have seen that as early as 1872, David Dudley Field published the draft outlines of an international code. With this as a basis, the Committee on Uniform State Laws of the American Bar Association has elaborated a number of acts embodying rules of conflict in matters of marriage and divorce. The committee recommended the following subjects as also proper for uniformity of legislation: "descent and distribution of property, acknowledgment of deeds, execution and probate of wills" (A. M. Eaton, "Proposed Reforms in Marriage and Divorce Laws," in *Columbia Law Review*, April, 1904). We have also seen that the International American Conference, held at Washington in 1890 and participated in by eighteen nations, recommended the adoption of a code of International Private Law between the United States and the other American republics. Although many of these attempts are doomed to failure so far as enactment into positive law is concerned, they represent the development of a theory apart from the decisions of the courts.

NOTES

1. There is no doubt that judges have greater power than legislators in developing the science of our topic; they evolve the law out of the theory and precedents, because positive provisions so often fail. Cf. Dicey, pp. 20-21.
2. Dicey well says, p. 11: "There exists a palpable convenience in the adoption by different countries of the same principle for the choice of law."
3. The Dutch jurist Jitta (*Archiv für öffentliches Recht*, xiv, p. 326), expresses the hope that the honor connected with leading the civilized world on the path indicated may ever be reserved to his fatherland.

§ 11. The Basis of Doctrinary Discussion.

I. There is no complete code of International Private Law having the force of law anywhere. For this reason the very existence of a special science has been doubted, but surely without foundation.

1. There are at least some positive rules adopted as part of national codes, referring sometimes to interstate, sometimes to international relations, or both. They apply, in some cases, to transactions which reach beyond native territory, in others, to aliens within the domain, or to both.

2. Customary law (*Gewohnheitsrecht*) is as important here as in International Public Law. Usages (*Usancen*) also require attention in many of the problems, especially those of mercantile law.

3. Of course, as long as the rules of International Private Law are not uniformly regulated throughout the world, the science remains a part of the internal law of each state. However, as we shall see, there are certain problems which admit of being lifted out of any particular or national territory. We may therefore discriminate between :—

- (a) a general system of International Private Law embracing the points upon which there exists a *communis opinio*, and
- (b) a particular system of International Private Law as worked out by each sovereignty singly.

Under these circumstances, the basis of doctrinary discussion may vary according to whether we are dealing with a question of positive law or one of principle. It is especially necessary not to confound *lex lata* with *lex ferenda*.

II. International Private Law is private law. There is no reason why private law should suddenly change its nature because applied to questions of international commerce.

- (a) There are certain local rules which regulate the relations of private persons in international matters directly, in that they provide which provisions of the *internal* civil law shall apply to these relations ;
- (b) and so far as they attempt to regulate the application of *foreign* law, they point out what *private* legal relationships shall be submitted to it.

1. Were we to adopt the view that rules of conflict belong within the domain of public law, then, according to Art. 4, No. 13, of the Constitution of the German Empire, the German federal state would not be competent to legislate upon the subject (Kahn in *Ihering's Yearbooks*, vol. xliii, p. 331).

2. International Private Law does not belong to the *law of procedure*. The contrary view was once held in Bavaria (*Codex juris bavarici*, 1753), and certain complete rules are still to be found in the statute of 1816 on procedure. These provisions have been expressly reserved by the Bavarian statute, executory of the German Code of Procedure and the Bankruptcy Act (Art. 81), and,

for this reason, are still part of the civil law of Bavaria (see v. Roth, *Bayrisches Civilrecht*, 2d ed., i, p. 167). The Appellate Court of the canton of Zurich held that rules of local conflict were not substantive law, but merely an indication to the court as to what law to use as a basis, and therefore worked retrospectively like a rule of procedure (*Handelsrechtliche Entscheidungen*, xiii, p. 129). The Swiss Federal Court overruled the decision, holding that the question of the local application of the laws was to be determined with reference to the time when the rights arose (*A. E.*, xii, p. 679).

3. International Private Law is not a branch of International Public Law, as it deals with the conflicting interests of private persons in private life. This view accords with that of Jitta ("Yearbook of the International Union for Comparative Jurisprudence," ii, p. 58); of Walker ("*Streitfragen aus dem internationalen Civilprozessrecht*," Vienna, 1897, p. 16); of Ullmann ("*Völkerrecht*," 2d ed., p. 9); of Gareis (2d ed., 1901, p. 195); and of Rivier ("*Principes du droit des gens*," i, p. 329).

Zitelmann (i, p. 258) seems to be of a contrary view, although he does not deny that the rules of conflict contain a considerable quantity of substantive private law. On the other hand, no one would deny that International Private Law comes into frequent contact with International Public Law.

NOTES

K. Leonhard, in "*Der allgemeine Teil des bürgerlichen Gesetzbuches in seinem Einflusse auf die Fortentwicklung der Rechtswissenschaft*," 1900, p. 23, maintains that the subject belongs to International Public Law only so far as the protection of aliens is concerned; that Public Law is binding only upon the sovereignty and not directly upon the court or parties; that International Public Law has nothing to do with interlocal or interprovincial law. A contrary opinion is held by Foelix, i, p. 27: "*Le principe de l'application des lois étrangères, dans le territoire d'une nation, appartient non au droit privé, mais au droit des gens: bien qu'il s'agisse au fond d'appliquer des dispositions du droit privé, cependant cette application n'a lieu que par suite de rapports de nation à nation.*"

Compare also: Wyss, *Z. f. schweizer. R.*, ii, p. 37, who is also of the opinion that the study of conflict belongs to public law.

G. Planck (*Bürgerliches Gesetzbuch*, vi, p. 23) well says that International Private Law is the interstate law of nations and that each has the right to provide whether a certain transaction is to be judged by its own law or that of another nation. *Contra*, Kühlenbeck (*Von den Pandekten zum bürgerlichen Gesetzbuch*, i, p. 48): "International Private Law . . . is not to be conceived of scientifically as a part of the law of the separate states."

§ 12. Interstate and Interprovincial Law.

Lainé, *Bulletin de la Société de législation comparée*, xxv, pp. 128, 209.

Roguin, *Conflits des lois suisses en matière internationale et intercantonale* (1891).

I. The subject of International Private Law, though involving many of the same problems met with in interstate, interprovincial, and intercantonal conflicts, has many distinguishing characteristics.

1. There is, however, a historical connection between the two, for we shall see (Part I, *infra*) that International Private Law had its origin mainly in the various disputes over the choice of law arising within one and the same state possessing divergent systems of law.

From a broader point of view, we speak to-day of "interstate law" in America, and of "*rapporti interstatuali*" in Italy. Confer:—

Jitta, *Méthode du droit international privé*, pp. 306-307.

Buzzati, *Autoità delle leggi straniere relative alla forma degli atti civili* (1894), p. 409 and note 3.

In the latter work the author speaks of "*conflitti interstatuali*." Zitelmann employs the term "interlocal private law" to express the same idea (cf. also Weiss, *Traité élémentaire*, Introduction, p. xvii).

2. The following differences distinguish interstate or interprovincial from international conditions:—

- (a) domicile has a different significance;
- (b) in the case of interstate or interprovincial conflicts, the highest sovereignty is a common one; the inferior jurisdictions may therefore be expected to yield more frequently to one another;
- (c) governmental organs with power to settle conflicts are lacking internationally.

3. The intercantonal law of Switzerland classifies citizens as follows:—

- (a) sojourners,
- (b) the domiciled.

Sojourners are those regarded by cantonal law as transients. This is especially the case with persons pursuing no trade of their own, *e.g.* students, factorymen, laborers, household servants.

4. No matter how instructive may be the analogy between interstate and international law, it is to be noted that often entirely

different propositions apply to each ; the one cannot be a standard for the other. The contrary opinion, expressed by Savigny (viii, 19, 27, 108) and followed by Stobbe and Gerber, is not correct. The remark of Brinz (*Pandekten*, i, § 23) is more to the point, viz., that these cases are *similar* to those of International Private Law, and Wächter, too (*Pandekten*, i, p. 152), has properly demonstrated the necessity of keeping them separate.

II. The Swiss Federal Statute (*N. & A.*) of 1891 follows this line of demarcation sharply ; it contains the following titles :—

- (a) Title I, which treats of the relations of Swiss citizens domiciled or sojourning in cantons other than that of their citizenship ;
- (b) Title II, which treats of the relations of Swiss citizens in a foreign country.
- (c) Title III, which applies Title I analogically to aliens domiciled or sojourning in Switzerland.

The law has also in its substantive provisions kept interstate and international matters separated. Thus, for example, in intercantonal matters, the status of the wife is governed by the *lex domicillii*, internationally, however, by the *lex patriæ*; questions of guardianship by *natural* right are referred to the law of the domicile in intercantonal relations; internationally, to the *lex patriæ*.

III. We can also speak of "*intercolonial law*" (compare, e.g., Torres Campos, *Bases de una legislación sobre extraterritorialidad. Estudios sobre el derecho internacional privado bajo los puntos de vista del derecho constituido y del derecho constituyente*). By this is meant :—

- 1. the law existing between a colony and the mother-land ;
- 2. the law existing between a number of colonies of the same or different countries.

As early as the first half of the fifth century B.C., the Epocian law of Naupactus (*Ἐποκία Λοκρῶν γράμματα*, §§ 3, 6 and 8) regulated certain questions in the intercolonial law of inheritance. The inhabitants of Opunt and other cities of eastern Locris despatched a colony (*Ἐποκία*) to Naupactus (western Locris); it has been held by Meister at the meeting of the Saxon Royal Academy of Science at Leipzig, November 14, 1895, that there was a general emigration from Asia Minor to Naupactus. A decree was issued

by the Opuntians regulating the political, religious, and legal relations of the colony with the mother-land. This was, perhaps, the birth of *intercolonial* law. The provisions are quite interesting — I extract the following: —

- (a) The members of the colony are freed from taxation at home; they pay taxes at Naupactus. Should they leave the colony without paying their taxes, they shall be placed under the ban of Locris. It was a kind of moral guaranty which Locris established for the benefit of the colony.
- (b) The right to reëmigrate to the mother-land is granted after public announcement of an intention so to do and payment of taxes due to the colony.
- (c) The colony was obliged to continue in relationship with the mother-land for thirty years.

In the case of the death of a citizen of Opunt, a son or brother who had emigrated to the colony was entitled to his inheritance; conversely, upon the death of a person in the colony, the persons rightfully entitled by the laws of the mother-land might inherit, though not residing in the colony, provided notice of claim were given within three months.

Compare: "*Recueil des inscriptions juridiques*," by Dareste, Haussolier, and Reinach, pp. 180-182, though no further information upon such questions of International Private Law as interest us *to-day* can be gained from this precedent.

In America and England

The several States of the United States being wholly independent jurisdictions, except in regard to the subjects expressly reserved to the federal government, it follows that the law and jurisdiction of one State are regarded by the courts of another as those of a foreign country. The United States Supreme Court has said (*Hanley v. Donoghue*, 116 U.S. 1, 4): "Judgments recovered in one state of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being reëxaminable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties."

Interstate law differs from International Private Law in that

the laws of the several States are, for the most part, derived from the same system of law, viz., the English common law. The conflicts of law between the States are therefore less radical than those between a State and a foreign country. It also follows that the courts of each State may find aid, by way of analogy or argument, from judgments pronounced by their neighbors, just as they do, in fact, from English decisions.

In England, dependent provinces or colonies are regarded in the same light as foreign countries, from the point of view of the application of private law (Dicey, p. 68). Even the courts of England and Scotland are completely independent of one another, although they have a common court of appeal in the House of Lords, and although judgments pronounced in one country may be made valid in the other by registration (31 and 32 Vict. c. 54). The judicial independence of the various parts of the British Empire has been repeatedly asserted (see *In re Orr Ewing*, 1885 Sess. Ca. 4th Ser. H. of L., xiii, p. 1).

NOTES

1. In addition to the works cited at the beginning of this paragraph, see also: M. Nesi, "*La loi fédérale sur les rapports de droit civil des citoyens établis ou en séjour*," in *Revue pratique de dr. i. privé*, 1893-1894. Also, Odier, in *Semaine judiciaire*, xvii, p. 113; Schlatter, in *Zeitschrift für internat. Privat- und Strafrecht*, ii, pp. 452-464; and Salis in *Z. f. Schweizer. R., N. F.*, xi, pp. 342. A cleverly tabulated combination of the rules of practice is given by R. Bader, "*Das Bundesgesetz betreffend die civilrechtl. Verhältnisse der Niedergelassenen und Aufenthalter*," 2d ed., 1898. Compare also: Des Gouttes, "*Essai d'interprétation du titre III de la loi fédérale*," in *Z. f. Schweizer. R., N. F.*, xvi, p. 304, and Wolf, xiii, pp. 1 and 319; also xv, p. 20.

2. Distinction is also made in International Criminal Law, at least under the American system, between (1) extradition and (2) interstate rendition. Compare Moore, "A Treatise on Extradition and Interstate Rendition," 1891, ii, § 516.

3. In Germany there is a controversy as to whether the rules of International Private Law contained in the Introductory Law to the Civil Code are applicable to the matters reserved for the separate states. Endemann, *Lehrb. des bürgerl. Rechts*, 8th ed., i, p. 102, claims that in the subjects reserved to state law, the old rules of conflict still apply, especially because connected with the separate systems of judicature peculiar to German confederation, and as well between the separate states as with foreign countries. Endemann adds, however, that rules of conflict established by federal law are applicable to the separate states even in the reserved branches. Kühlenbeck, *Von den Pandekten zum bürgerlichen Gesetzbuch*, i, p. 67, is also of the opinion that the rules of the Introductory Law do not apply to matters reserved for state law, and adds that the conditions created by this statute are highly unpleasant. In accord is A. Niedner, *Das Einführungs-*

gesetz vom 18 August, 1896 (Berlin, 1899), p. 11, who suggests that new rules of conflict can be built up in those matters. Von Seeler remarks, in his opinion given for the German "*Juristentag*" (1897), that with the coming into effect of the Civil Code, the former general and particular International Private Law applicable to the Confederation went out of effect *so far as* concerns the subjects treated therein. Goldmann and Lilienthal, *Das bürgerlichen Gesetzbuch systemat. dargestellt nach der Legalordnung des allgemeinen Landrechts*, p. 18, note 2, are opposed to this conception, and refer to Art. 55 of the Introductory Law. They add that "the subjects reserved" must be completed by the provisions of the code and the Introductory Law but *in no wise* by the reserved state law. Cosack, *Lehrb. des deutschen bürgerl. Rechts*, i, p. 45, is of the view that the rules of the Civil Code apply also to the subjects reserved to the states, which includes also the relations of the particular systems of German law, one to another.

PART ONE

A SUMMARY SKETCH OF THE HISTORICAL DEVELOPMENT OF INTERNATIONAL PRIVATE LAW

Introductory Remarks

I. A proper introduction to the study of International Private Law requires a knowledge of its sources. Its modern development can be understood best in the light of history.

1. The Roman law does not yield much of value, but it requires some consideration, because the jurists of the Middle Ages attempted to base their deductions upon Roman authorities. Even Savigny refers his theory of the local application of the laws to this source—I have in mind his discussion of the law of the place of performance in the law of contracts.
2. The real origin of International Private Law must be referred to the early Middle Ages among Germanic peoples. It was first acknowledged as a science in later mediæval Italy by jurists of various nationalities, especially Italian and French.

II. We cannot analyze here each separate process of the entire historical development. To set forth the history of International Private Law in all its branches and phases is an interesting and remunerative work of its own. I will simply attempt to outline briefly the principal epochs, renouncing all detail.

III. The following authorities may be conferred:—

1. Lainé, *Introduction au droit international privé, concernant une étude historique et critique de la théorie des statuts et des rapports de cette théorie avec le code civil*, i (1888); ii (1892). This work is based upon a very minute examination of the detail.
2. Catellani, *Il diritto internazionale privato e i suoi recenti progressi* (1895), i: "*Storia del diritto internazionale privato*."
3. A. Weiss, *Traité théorique et pratique de droit international privé* (1894), ii: "*Droit de l'étranger*."
4. K. Neumeyer, *Die gemeinrechtliche Entwicklung des internationalen Privat- und Strafrechts bis Bartolus* (1901). This work treats of one historical epoch.

IV. The study of the early works upon the statutory conflict is absolutely necessary for a thorough acquaintance with the topic

before us. Many authors base their theoretical treatment of the international problems of to-day upon nothing. As a rule, the doctrines of these jurists are of like character; they lack the solidity of historical foundation. Their solutions are like airy creations, and must be given up at the first practical application.

I. IN ANCIENT TIMES

§ 13. The International Conceptions of Ancient Nations, especially the Greeks and Romans.

Egger, *Études historiques sur les traités publics chez les Grecs et chez les Romains* (Paris, 1886), pp. 7 et seq.

P. van Wetter, "De la condition civile des étrangers d'après le droit romain," in Laurent's *Droit civil international*, i, Annex, pp. 667-678.

Calvo, *Droit international théorique et pratique*, 4th ed., ii, §§ 520 et seq.

M. Chauveau, *Le droit des gens dans les rapports de Rome avec les peuples de l'antiquité* (Paris, 1891).

Mommsen, *Römisches Staatsrecht*, iii, pp. 590-606.

A. Schmidt, *Zum internationalen Rechtsverkehr der Römer* (1888).

v. Holtzendorff, *Handbuch des Völkerrechts*, i, pp. 159 et seq.

Pierantoni, *Trattato di diritto internazionale*, i, pp. 71 et seq.

M. Voigt, *De fœdialibus populi romani quæstionis spec* (Leipzig, 1852).

Catellani, *Il diritto internazionale nell' antica Grecia* (1892).

Weiss, *Le droit fœdial et les Fœdiaux* (Paris, 1880).

Fusinato, *Dei fœdiali e del diritto fœdiale* (Rome, 1884).

M. A. Carnazza, *La istituzione dei fœdiali in rapporto al diritto pubblico romano* (1886).

G. Berviera, *I fœdiali e il diritto fœdiale* (1898).

I. International relations were slight in ancient times, as each nation considered itself under the special protection of gods. But wars of conquest and commercial enterprise soon brought the peoples of the Orient together. It is difficult to speak positively of their international views. The stranger was generally regarded as an enemy, unless some special understanding made him otherwise.

II. The idea obtained among the Greeks that they were destined by nature to be supreme over all other nations. There was, indeed, an attempt to establish an international court of arbitration in the Amphyctionic Council, and to refer the system of political equality to the conception of hegemony. Such protection as the stranger received was accorded through the medium of religion. Both International Public as well as International

Private Law were originally of sacred origin. The Athenians were particularly pious in their treatment of strangers. They erected an altar dedicated to sympathy for them.

III. The Roman conception was less blunt, except in the earliest times. It was said, "*adversus hostem æterna auctoritas.*" It is certain that the equality of other states with Rome was never recognized. There was, however, a College of Fetiales which established humanitarian rules with other nations before the outbreak of war. This institution represents an interesting step in international law.

Rome also made treaties with neighboring peoples and with Carthage. A passage in Cicero is often cited (*De officiis*, iii) wherein it speaks of a "*communis humani generis societas*," but it is not to be forgotten that this conception was hardly deep-rooted among the Roman people. It is the expression of a jurist and statesman who had advanced beyond public opinion.

IV. International Private Law presupposes that the separate states be considered as, or approximately as, individual subjects of law, like persons before the internal law. This refined conception the ancient world never attained. A long historical process proved necessary, which, in part, is still pending.

From this summary of the conditions, it may be seen that the existence of formally binding rules of International Private Law in ancient times is highly improbable. Yet there was a commerce in need of them, and conflicts must have arisen the moment foreigners entered the ancient state and concluded legal transactions. The question remains: In what manner were they solved?

§ 14. Attitude of the Roman Sources of the Law to the Conflicts of International Private Law.

Karlowa, *Römische Rechtsgeschichte*, i, p. 279.

Voigt, *Das jus naturale æquum et bonum und jus gentium der Römer*, iv, pp. 285-331.

Mitteis, *Reichsrecht und Völkerrecht in den östlichen Provinzen des römischen Kaiserreichs* (1891), p. 123.

Fusinato, *Revue de dr. i.*, xvii, pp. 278-296.

v. Bar, i, pp. 22-25, 601, note 7; ii, p. 439, note 46.

Jean Beyssac, *Des conflits de lois à Rome* (Bordeaux, 1888).

J. Milhaud, *De l'application de la loi pétrigrine à Rome* (Paris, 1892).

I. The question has arisen whether certain propositions of the *Corpus Juris* can be regarded as rules of International Private Law, and also whether they are applicable as such to-day in jurisdictions deriving their laws from Roman sources. There is also a question whether any of the laws of Justinian point out what system of law is applicable to transactions in the Roman state between the following classes of persons:—

1. two or more *peregrini*;
2. *cives Romani* and *peregrini*.

A number of passages from the *Corpus Juris* were cited, to which the significance of rules of conflict was given; but none of them assume to regulate questions of international law in the modern sense of the term.

II. The situation created by the Roman law was as follows:—

1. The *jus civile* applied only to Roman citizens. There was also a law of condition or personality—if we may borrow an expression which came in historically later. The peregrine did not enjoy equal rights with the *civis* in matters of private law unless by special treaty with other nations, or unless the *connubium* and *commercium* were extended to him.
2. The *jus gentium* was very important in determining the relation between the Roman citizens and the peregrines, although nothing certain can be said in detail.
3. As to transactions made between peregrines *inter se*, it is probable that the Roman courts applied the law of the country to which they belonged; how far this occurred cannot be stated, but it probably extended only to the law of the family and of succession.
4. The will of the parties was doubtless given a certain importance.

III. A scientific theory of International Private Law was never constructed in the course of the development of the Roman law, for the reason that under Caracalla (212–217 A.D.) Roman citizenship was extended to all residents of the Roman Empire. This carried with it the acceptance of the Roman law, and henceforth there was no real necessity for the regulation of conflicts of law. As appeared later, however, local differences in the law within the Roman state itself had not been eradicated by this event.

IV. To sum up, the science was not of Roman origin, although the idea that it was, obtained for a long time among jurists, such

as Joannes Faber (died 1340) and Bartolus (died 1355 or 1357), and was continually confirmed by references made to Roman sources. As Lainé figuratively remarks, jurists for centuries took their domicile in Roman law in order to solve the questions of the *collisio statutorum*.

NOTES

1. Th. Kipp, in his "*Quellenkunde des römischen Rechts*" (1896), says correctly, p. 127, that the question as to which national law was applicable to their transactions must have arisen in the trade of the Romans with peregrines and between peregrines of different nationalities. Kipp then adds: "This question could have been solved by the use of the modern concept of personality, or it could have been solved by the rule of territoriality. In this way, there could have been established rules for the choice of the system of law to be applied. This the Romans did not do, but instead of choosing the national law of either of the parties, they applied a third law, the *jus gentium*."

2. Oppenheim, "*System des Völkerrechts*" (2d ed., 1866, p. 293), says that the older jurists continually called to their aid the Roman and the canon law "to whose crutches they were so much accustomed." It is to this circumstance that Oppenheim traces the continuous accumulation of controversies, and the endless contests among theorists over maxims "which frequently led all to the same goal and which hardly troubled the mind of the practitioner, the legislator, or the judge."

§ 15. The *jus gentium* of the Romans.

Voigt, i, pp. 64, 399; ii, p. 184.

Baron, *Peregrinenrecht und jus gentium* (1892).

J. Gilson, *L'étude du droit romain comparé aux autres droits de l'antiquité* (Paris, 1899).

I. Besides the *jus civile* (in contradistinction to the *jus honorarium* or *prætorium*), the Romans also had a body of laws known as the *jus gentium*, "*quod apud omnes populos peræque custoditur*." This term had doubtless an international legal significance, but when we speak to-day of International Public Law (*droit des gens* or *Völkerrecht*) we mean something quite different in form and substance from the Roman *jus gentium*.

II. The conception of the *jus gentium* became, indeed, a practical matter also in *private* law. In order to understand the meaning of the expression, the following should be kept in mind:

1. that the origin of Roman private law was contained in the twelve *tabulæ*;
2. that an array of thoroughly foreign statutes were adopted as a result of the gradual extension of the Roman dominions;

3. that the prætors developed the private law of Rome, by gradually extending their jurisdiction to informal transactions ;
4. that these amendments, additions, and moderations of the rigid civil law were the natural consequence of the consideration paid to foreign rules and customs, that is to say, of a comparative study of law.

The *jus gentium* thus represents a complex of strange views of private law taken from the *jus provinciale*, from the *jus* of the *liberæ civitates*, from special municipal law, or from the customs of foreign peoples such as the Egyptians and Greeks. The details have not yet been elucidated and really do not belong here.

III. Just as International Public Law in later times grew out of what was originally only a sacred or fetial institution, so, in the times of the Romans, peregrinary rules of private law were taken over into the *jus civile*. The latter process was more rapid, and accomplished its purpose sooner, for the reason that the Romans themselves had an urgent interest in bringing transactions with peregrines to recognition. In this way, the early creation of a prætorship for foreign law is explained. It was precisely the independent function of the *prætor urbanus* and *peregrinus* that was so valuable in the completion of the Roman law as a universal system.

After what has been said, it is clear that the Roman designation of *jus gentium* did not embrace International Private Law ; on the other hand, the psychological ground for the merging of the *jus gentium* into the *jus civile* is to be discovered in the international and interprovincial trade of the Romans.

Voigt (ii, pp. 657, 661) does not agree with any part of this interpretation, although he recognizes that the *jus civile* was by degrees forced into the domain of the *jus gentium*, and that the latter finally also became authoritative *inter cives*.

NOTE

The jurisdiction of the Roman courts was regulated in the year 512 *ab urbe condita* (= 242 B.C.). The *prætor urbanus* determined the law in cases between Roman citizens ("*prætor qui inter cives jus dicit*"), the other in cases between non-citizens *inter se* and between citizens and non-citizens ; he was the "*prætor qui inter peregrinos jus dicit*," or "*prætor qui inter cives et peregrinos jus dicit*." Compare Mommsen, *Römisches Staatsrecht*, ii, 1, pp. 178 and 179.

§ 16. The Recuperators.

Sell, *Die Recuperatio der Römer* (1837), pp. 74, 82, 117, 271-273.

The courts of the Recuperators were, in a certain sense, the practical realization of the respect for foreign law, developed by the *jus gentium*. We find in this institution a kind of international trade law applied by courts of trade.

I. The Recuperators were in the nature of governmental arbitrators, resorted to for the recovery of things (thus *recipere*), and for the prosecution and satisfaction of private claims between the Roman people on the one hand, and foreign kings, peoples, and states with which treaties had been made, on the other.

The oldest league was with the Latins. It was established that suits on contracts between Romans and Latins should be decided by the court of that people wherein the contract was made. This custom was afterwards adopted in making treaties with other peoples. We can say that the Recuperators in the Roman law formed a special institution for questions of peregrinary law, *i.e.* for questions of private law in international or interstate disputes, wherever the Romans had made legal protective unions with other states.

II. The appointment of the Recuperators was in the hands of the magistrate intrusted generally with the jurisdiction of these cases, *i.e.* the *prætor peregrinus*. If there were no treaty, merely the fetial *jus* was called into function. It is highly improbable that the Recuperators decided also public matters.

1. For transactions of an international character, the place of conclusion was considered the venue—*forum loci actus*; a general international rule was probably formulated later from the provisions of the Latin union.
2. As almost every possible form of legal damage can be thought of as arising between the treaty nations, the scope of jurisdiction of the Recuperators was doubtless not insignificant.
3. It is probable that the Recuperators were selected from members of the participating nations.
4. The dispute was probably decided by substantively reconciling the laws of two peoples in one and the same case. Equity played a very important rôle. Reference may have been made in the treaty of amity itself, as to rules of law to be applicable.

III. It may simply be said that the Recuperators *remind* us of the practice of to-day whereby our modern judges are induced to apply foreign law.

NOTE

Festus says, "*Recuperatio est, ut ait Gallus Aelius* (an antiquarian lexicographer of the time of Cicero) *cum inter populum et reges nationesque et civitates peregrinas lex convenit, quomodo per recuperatores reddantur res recipiunturque, resque privatas inter se persequantur.*"

II. THE PERIOD OF THE LEGES BARBARORUM

§ 17. Law of Personality or Race Law.

Savigny, *Geschichte des röm. Rechts im Mittelalter*, i, p. 115.
Brunner, *Deutsche Rechtsgeschichte*, i, p. 259.

I. The *leges barbarorum* (*i.e.* the successive systems of Germanic law between the fifth and the ninth centuries) contained enactments in the form of statutes, of the principle of personality. The separate races claimed the right of being treated and judged according to the particular law of their birth, both as to private and penal matters.

These laws or popular rights existed in connection with other provisions of the International Private and Penal Law of the Germanic period. It is interesting to recall that Bishop Agobard of Lyons, in a letter to Ludwig the Pious, says:—

"It often occurs that five men walking or sitting together are each of them living under a different law."

II. The system of race law is principally to be accounted for politically, through the gradual dissolution of the Roman Empire, and by reason of the fact that a strong and unified government was lacking, with the single exception of the reign of Charlemagne. The Germanic love of freedom needed no awakening. The emphasis given to race was easily carried over by the intercourse of the conquerors with the conquered Romans. The new Germanic states were held together by the common rule of certain German chiefs, but in other respects the various races (or nations) were independent of each other.

A separately developed International Private Law could have been of practical assistance among the different tribes, but it did not exist. However, there were certain legislative attempts made

by the German kings to issue rules for the Roman inhabitants of their domains, applicable in disputes among themselves. These are the so-called *leges Romanæ*, more especially:—

1. the *lex Romana Visigothorum* (promulgated in 506 by King Alaric II, for the Romans of West Gothic Empire; afterward termed *Breviarium Alaricianum*);
2. the *lex Romana Burgundiorum* (issued by Gundobada toward the end of the fifth century).

The attempt was made in these precedents to establish a certain system of International Private and Penal Law, although in their nature no answer is given to the question as to what objective law is to be applied when members of different peoples come into legal relationships with each other.

NOTES

1. The statement of Agobardus was as follows:—

"Tanta diversitas legum, quanta non solum in singulis regionibus aut civitatibus, sed etiam in multis domibus habetur. Nam plerumque contingit, ut simul eant aut sedeant quinque homines, et nullus eorum communem legem cum altero habeat" (Brunner, *Deutsche Rechtsgeschichte*, i, p. 259, note).

2. The law *de originis*, in the sense of a law of descent (or birth), is clearly expressed in the *lex Ribuaria*, xxxi, § 3 (ed. Sohm, p. 61), in the following words:—

"Hoc constituemus ut infra pago Ribuario tam Franci Burgundionis, Alamanni seu de quacunque natione conmoratus fuerit, in iudicio interpellatus, sicut lex loci continet, ubi natus, fuit, sic respondeat." And § 4, *"Quod si damnatus fuerit, secundum legem propriam, non secundum Ribuariam damnum susteneat."*

3. The *Edictum Theodorici* was (soon after 512) made applicable to Romans and Ostrogoths.

§ 18. The Range of Race Law.

Laurent, i, Nos. 193, 198–200.

Laine, i, pp. 56, 60.

Brunner, i, pp. 261–268.

I. Race law, as established by the *leges barbarorum*, embodied all phases of life. Wherever the population was mixed, a custom grew up for the parties to state before court, the law under which they lived, preliminary to closing legal transactions. This was called the "*professio juris*."

A *professio juris* might have read as follows: "*ego ex gente Romanorum (Langobardum, etc.) professus sum, ex jure Romano (Langobardico, Gothico, etc.) vivere.*"

These declarations no doubt served to bring a *certain* amount of clearness into legal transactions. As a rule the act was considered an election of law. But it was necessary that the act be done publicly. The private citizen, carrying out this declaration in perfection, was obliged, upon a solemn occasion such as his coming of age, to proclaim for the future, to which race he belonged, and this notification was registered. But we can hardly make any definite assertion on this point.

II. Race law had the following results :—

1. in private relations, the origin of the father was authoritative ; the wife lived under the law of her husband ; as widow she again resumed the law of her birth ;
2. in contracts, each of the parties was liable according to the law of his birth, namely, that which he had declared to be such ;
3. the law of inheritance was governed by the tribal law of the deceased ;
4. personality served also in torts ; thus in determining the blood-wite (*Wehrgeld*), the valuation placed upon the deceased by his own tribe was the criterion.

In order to understand fully the range of race law, we need only keep in mind the general influence of the European in the Orient. An inhabitant of a European colony (*e.g.* of the Dutch or French Indies) could submit himself to European law.

III. The great error committed by Laurent consists in believing this "personality" of the *leges barbarorum* to be the forerunner of the modern principle of nationality. The latter axiom rests upon the proud conception of a homogeneous state, from which arises the claim for the application of the national law in *certain* subjects. The former principle, however, rested upon the view that the race stood independent, notwithstanding the *dissolution* of the state, and demanded that race law be unconditionally authoritative in almost *all* directions. The French jurist Lainé corrected this error of Laurent, although German jurists continually refer to the modern law of nationality as a development from the Germanic system of personality.

To trace the principle of nationality historically to the *leges barbarorum* is not merely superficial and incorrect, but also impractical and misleading. Authors in England and America, countries which do not support the principle, cite the historical crudity of the

situation from which the principle of nationality is *supposed* to have arisen, as an argument in opposition to its acceptance under modern conditions.

NOTE

It is noteworthy that Laurent proposed the use of the *professio juris* in modern life in his "*Avant-projet de révision du code civil*" (Art. 15), prepared for the Belgian government.

III. THE FEUDAL PERIOD

§ 19. Rise of the Feudal System and the Effect of Territoriality.

Stobbe, *Deutsches Privatrecht*, ii, pp. 361-445.

Roth, *Feudalität und Untertanenverband* (1863).

Brocher, "*Les Origines de la Féodalité*," in *Revue d. dr. i.*, xxiii, pp. 541-559.

I. The Frankish kings demanded an oath of allegiance from their tenants. As the ownership of land had an extraordinary significance in the Middle Ages, the landlords and the great municipalities imitated this practice and demanded it from tenants in their neighborhoods.

The relationship of service in public law and the obligation of military service which preceded it was later (perhaps beginning with the tenth century) applied to private law. Thus it was concluded that all persons and things within the boundaries of a certain territory were subject to *its* law exclusively. In other words, territorial prerogative held its citizens within a unity, so long as they lived within the particular local domain. The basis was no longer that of race origin. Out of this psychological conception gradually arose the so-called principle of territoriality. Of course, the nature of this process varied as it developed itself respectively in France, Germany, and England. It was hastened in France through a kind of codification of the different provincial laws.

II. The feudal theory was summed up in the phrase: —

"*omnes consuetudines sunt reales*" ("*Toutes coutumes sont réelles*").

Under the feudal system, the idea arose that, to a certain extent, man belonged to the land upon which he lived, and therefore it was said: —

"*bona personam non sequuntur sed personas ipsas ad se trahunt.*"

NOTES

The feudal system was sharply defined in the ponderous law books of the old Saxons and Suabians. Compare:—

1. Sachsenspiegel (1215-1235):—

(a) Book 1, Art. 30: "*Jelich inkomen man entftt erbe binnen deme lande zu Sachsen nâch des landes rchte und nicht nâch des mannes rchte, he sî Beier, Swab oder Franke.*"

(b) Book 3, Art. 33, § 2: "*Jeclich man mûz ouch antwurten vor me kunge, in allen staten, nâh sime rechte, und nicht nâh des clegeres rechte.*"

2. Schwabenspiegel (1273-1276), part 1, c. xxxii:—

"*Ein ieglich man, der us einem lande in daz andere kumt, und wil vor gerichte reht nemen umb ein gut, daz in dem lande lit, der muz reht nemen nach des landes rehte und nicht nach sines landes rehte.*"

IV. THE ITALIAN DOCTRINE

§ 20. Acceptance of the Roman Law.

Lainé, i, p. 93.

I. From the tenth century onward, while France and Germany were developing the fief as the natural means of protection against continual rapine, free municipal commonwealths were being founded in Italy. By the twelfth century they had attained almost complete autonomy and issued (partly even from the eleventh century on) municipal laws called *statuta*. These small but industrious communities conducted a large trade amongst themselves, from which arose conflicts of law, viz. the historically real and properly so-called cases of statutory collision.

II. As the Roman law was again being extensively cultivated in Italy, especially in Bologna, it was natural to seek in it a solution of these conflicts. Three questions arose:—

1. Are the statutes valid as compared with the existing *leges*?
2. If so, what is the scope of their application as compared with the Roman as the common law?
3. How is a conflict to be solved?

These questions arose later also in France as the *coutumes* were established.

The theoretical treatment of the questions as formulated was by a reference to the following extract from the *Corpus juris*, viz.:—

Lex 1, C. de summa trinitate et fide catholica et ut nemo de ea publice contendere audeat 1, 1:—

"cunctos populos quos clementiæ nostræ regit imperium in tali volumus religione versari quam divinum Petrum apostolum tradidisse Romanis."

The remark of the Gloss is as follows:—

“Quodsi Bononiensis conveniatur Mutinæ non debet judicari secundum statuta Mutinæ quibus non subest, cum dicat: ‘quos nostræ clementiæ regit imperium.’ Videtur hic textus supponere quod non omnes populos regit imperator, quod an sit verum vide hic pulchre per Joannem Fabri in suo breviario.”

The effect of this is that the *Corpus juris* was interpreted as applying only to the parts of the empire where the Christian religion had been accepted. One wonders at this local interpretation, but the phrase which was considered decisive was “*cunctos populos quos.*” The scope of application of the Roman law was made dependent upon it. The doctrine of the early Italian School as represented in Bartolus was completely influenced by the Gloss.

II. As succeeding jurists continued to discuss questions of the local application of the laws in connection with the *lex* “*cunctos populos quos,*” it came to be the nucleus of the so-called doctrine of statutory conflict. We shall see how, in the course of the centuries, it underwent many transformations.

NOTE

The reference of the theory of conflict to the *lex* “*cunctos populos quos*” excited the greatest astonishment among later jurists. Laurent exclaims (I, No. 214): “What relation is there between an incomprehensible dogma and a question of jurisprudence, and what connection is there between the words ‘*cunctos populos*’ and the statutes?” Phillimore says (iv, p. 19): “Who would have expected such a treatise in a Gloss on the words ‘*cunctos populos*’ in a chapter ‘*de summa trinitate*’?”

§ 21. Bartolus as Leader of the Earliest School of International Private Law.

Savigny, *Geschichte des römischen Rechts im Mittelalter*, vi, pp. 137, 510.

Bethmann-Hollweg, *Der Civilprozess des gemeinen Rechts in geschichtlicher Entwicklung*, vi, pp. 1, 242–247.

Archivio giuridico, xxi, pp. 537–548.

C. Bernabei, *Bartolo da Sassoferrato e la scienza delle leggi* (1881).

Orlando, *La legislazione statutaria e i giureconsulti italiani del secolo*, xiv (1884).

Montijn, *Aanteekening op de leer van het internationaal privaatrecht bij Bartolus* (Utrecht, 1887).

Harrison, *Journal de dr. i.*, vii, p. 423.

Lainé, i, p. 131; ii, p. 356.

Bartolus (1314–1355 or 1357) was not the first author who discussed the conflict of laws, but in his work, “*In primam codicis*

partem commentaria," he attacked these difficult problems with unprecedented spirit. His influence (in connection with that of Baldus) was enormous throughout the whole field of jurisprudence.

Bartolus interested himself in two rather incorrectly stated questions which he uses as a basis. His treatise, in great measure, keeps them separated, viz. :—

(a) *primo, utrum statutum porrigatur extra territorium ad non subditos ?*

(b) *secundo, utrum effectum statuti porrigatur extra territorium statuentium ?*

The principles established by Bartolus in answer to the *first* question (a) may be stated as follows :—

I. Upon questions concerning the capacity to have rights and the capacity to act, reference need not be made to the law of the place where the obligations were entered into (No. 32 ; see also Baldus, Nos. 61 and 77).

II. In contracts, Bartolus (No. 16) makes the *lex loci contractus* authoritative when this effect can be drawn from the *circumstances* of the contract. This may be designated as the origin of the theory which still controls in France, England, and America.

Bartolus follows this principle in regard to :—

1. marriage settlements. The residence of the husband is authoritative (No. 17, "*fallit in dote*") ;
2. the effect of delay and negligence. This leads to the application of the *lex fori* (*locus ubi petitur*). Why? Because that is the place where contractual negligence or delay occurs. But we shall see that the place where an act occurs cannot be regarded as authoritative as to the choice of law in contractual relations, though it be so in torts.

III. The *forms* of legal transactions must follow the statute (law) of the place where they occur. This maxim of Bartolus, though unsound when stated so broadly, acquired an extraordinary importance, which, in fact, it has not lost to this day.

IV. Bartolus makes the *lex fori* control in respect of the limitation of actions, but if a particular place where the obligation is to be performed is mentioned, the law of that place must govern (No. 29).

The doctrine of England and America considers the first part

of this rule as an article of faith, — and that, too, notwithstanding the best arguments to the contrary.

V. Upon conflicts in succession, Bartolus maintains the following : —

1. In case of intestacy, the law of the place where the property is situated must control (Bartolus, No. 42 ; see also Baldus, No. 85). We shall see how this rule became altered through the doctrine of "*statuta favorabilia*" and "*statuta odiosa*."
2. The local law was not regarded applicable to foreigners so far as concerns the *substantive* extent of the power to dispose by will : —

"quia statuta non possunt legitimare personam non subditam nec circa ipsam personam aliquid disponere" (No. 20 ; compare also Baldus, No. 58).

3. The *lex loci* sufficed for the *form* of executing the will (Nos. 22 and 36). The reason given in No. 41 is characteristic : "*non enim per hoc alteri civitati præjudicatur.*"

It is interesting to note how clearly Bartolus distinguishes the "*solemnitas actus*" from the substance of the transaction (Nos. 26, 32, 37, and 41).

VI. In the law of property, the "*statutum loci ubi res est*" controls (No. 27).

VII. The distinction between substantive private law and procedure was expressed (in accord with Joannes Faber, Albericus de Rosate and Petrus a Bella Pertica) in the following form, "*litis ordinatio, et litis decisio.*"

Upon the *second* question (*b*), Bartolus advances arguments that are in many cases difficult to reconcile with his deductions upon the first.

I. He says that a statute denying a person the competency to act will bind that person also extra-territorially, if the state has ordained it *for his benefit*, i.e. "*statutum favorable.*" To this class belongs, for example, the theory of the *prodigus* in the law of minors. The antithesis is a *statutum* or *privilegium odiosum*. To this class belongs, for example, the statute that a daughter shall not succeed. Such a statute will not apply to property situated beyond the territory.

II. As has been said, Bartolus upheld the proposition that the

law of the place where the property is situated shall decide rights of succession.

In solving a question of succession, where the deceased left property in England, though having died in Italy, Bartolus applied his doctrine of "*statutum favore et odiosum*." He says:—

"verba statuti seu consuetudinis sunt diligenter intuenda; aut enim disponunt circa rem, aut circa personam."

He then continues by saying that it depends whether the statute provides:—

1. "*bona decedentium ut veniant in primogenitum*."

In this case the English statute would apply both to Englishmen and non-Englishmen, as it attaches itself *to the thing*; it is a statute real ("*jus afficit res ipsas*").

2. "*primogenitus succedat*."

In this case a distinction must be made:—

(a) if the deceased were not an Englishman, though having property in England, then this statute would not be applicable to the inheritance:—

"quia dispositio circa personas non porrigitur ad forenses;"

(b) if the deceased were an Englishman, the first-born would be entitled to all property situated in England; as to the property situated elsewhere, only to the usual successory proportion according to the *jus commune*.

Unfortunately, these remarks thrown out by Bartolus were received with approbation; in part, too, they were subjected to strong opposition. It would have been better had they led to the further development of doctrinary detail. However this may be, it is not true that Bartolus divided the statutes into two great classes, viz.:—

1. *statuta personalia*;

2. *statuta realia*.

Some celebrated modern jurists believe that therein lies the pith of the "Bartoline rule." I believe this a great error. The question is purely academic, however, and will not be discussed here.

In generalizing, we may say that the doctrine of the earliest Italian School as typified in Bartolus constituted an able beginning in the scientific treatment of the *collisio statutorum*.

NOTES

1. The clause in Bartolus, No. 42, is as follows:—

"Mihi videtur quod verba statuti seu consuetudinis sunt diligenter intuenda. Aut enim disponunt circa rem, ut per hæc verba: bona decedentium veniant in primogenitum. Et tunc de omnibus bonis iudicabo secundum consuetudinem et statutum, ubi res sunt situata: quia ius afficit res ipsas, sive possideantur a cive, sive ab advena: ut

l. 6. i. f. de muneribus et honoribus 50. 4. et

l. 3. C. de ædificiis privatis 8. 10.

"Aut verba statuti seu consuetudinis disponunt circa personam, ut per hæc verba: primogenitus succedat; et tunc aut ille talis decedens non erat de Anglia, licet ibi habaret possessiones: et tunc tale statutum ad eum et ejus filios non porrigitur: quia dispositio circa personas non porrigitur ad forenses; ut dictum est supra in tertia questione in fine. Aut talis decedens erat Anglicus et tunc filius primogenitus succederet in bonis, quæ sunt in Anglia, et in aliis succederet de jure communi: secundum quod dicunt dicti doctores; quia, sive dicatur hoc esse statutum privativum de filiis sequentibus, quia est odiosum non porrigitur ad bona alibi posita: ut supra probatum est in sexta questione. Sive dicatur statutum esse permissivum tollendo obstaculum, ne sequentes filii impediant primogenitos: et idem, ut supra dictum est. Ad hoc ut inspiciatur, utrum dispositio sit in rem vel personam facit:

l. 81. i. f. de contrahenda emt. 18. 1."

2. Story, § 14, calls the discussions of Bartolus, "a memorable example of those niceties" of which (according to Story) there are so many to be found among Continental jurists. At the close of § 14, Story adds that the distinction made by Bartolus was properly criticised by other civilists. More to the point is Phillimore (iv, p. 19), who expresses himself as follows:—

"This is the fountain of private international jurisprudence. Without a careful study of this commentary, nobody can be thoroughly versed in the history of the progress of the principles of private international law." Cf. Phillimore further, pp. 248, 249, and 254-257.

3. For a further valuation of the theories of Bartolus, compare Hrabar, "*L'époque de Bartole dans l'histoire du droit international*," in *Revue général de dr. i. public*, vii, pp. 732-749.

4. Among the immediate predecessors and contemporaries of Bartolus the following jurists may be cited:—

Dinus (not the one mentioned in Savigny's history, iv, p. 447). He was professor at Bologna (died about 1298).

Jacobus de Arena. He died about 1296 (Savigny, v, pp. 399 and 401).

Oldradus. Bartolus calls him his teacher (Savigny, vi, p. 55).

Gulielmus Durantis. This jurist, born 1237, at Puimisson, near Beziers, Languedoc, studied at Bologna—he might have studied with Accursius († about 1260) and Odofredus († 1265). He edited the "*Speculum judiciale*," a great compilation, of which it has been said: "that as the ocean receives the waters of the rivers, so did its author absorb the knowledge contained in the more important of the earlier treatises and enriched it with the experience of his own active life as teacher of law, judge, and statesman." On account of this work, the author was called "*Speculator*"—he died 1296.

The following three extracts of the Speculator are in point:—

lib. 2, part. ii, § 12: "*De instrumentorum editione*," Nos. 15 and 16 (form of wills).

lib. 2, part. iii, § 5: "*De sententia et de his quæ ipsam sequuntur*," No. 2 (contracts).

lib. 2, part. i, Nos. 5-11: "*De constitutionibus*."

Jacobus Buttrigarius. A teacher of Bartolus; born 1274; died 1348.

Gulielmus de Cuneo (Cuneaux). A contemporary of Cinus (Savigny, vi, p. 34).

Joannes Andreae. Died 1348. Compare Savigny, vi, pp. 98-125. He wrote, among other things, additions to the "*Speculum*." See Schulte, "*Die Geschichte der Quellen*," i, p. 20; ii, pp. 205-229. His contemporaries called him "*fons et tuba juris*" (Schulte, ii, p. 210).

Petrus a Bella Pertica. Died 1308. A pupil of Jacobus a Ravenna and author of "*Repetitiones in aliquot divi Justiniani imperatoris leges*."

Cinus (not Cynus: Savigny, vi, p. 73). Born at Pistoja, 1270; died 1336. Bartolus was his pupil (Savigny, vi, p. 142). Compare L. Chiapelli, "*Vita e opere giuridiche di Cino da Pistoja con molti documenti inediti*" (1881).

Albericus de Rosate or de Rosciate Bergomensis († 1354). A lawyer who, among other things, wrote a commentary to the *codex* and an *opus statutorum*. This tract, if I judge correctly, is the first to free itself from the *lex 1, C. de summa trinitate*. There are four main categories specially treated by Rosate: I. Testamentary Questions; II. Contracts; III. Succession; IV. Criminal Law. They are published in the work "*Tractatus illustrium . . . de stat. et consuet. et priv., tomus secundus*," (Venice, 1584). The treatise has the title "*Alberici a Rosate. J. C. clariss. comment. de statutis libri iv.*" See t. ii, pp. 2-85.

Joannes Faber († about 1340). He ("*ego dictus fui Faber, non ferrarius quia libenter operor et facio operari*," as he himself explains) was a doctor of laws in Montpellier and afterward a lawyer in Angoulême.

Upon Faber, confer:—

Savigny, "*Geschichte des röm. Rechts in Mittelalter*," vi, pp. 40-45.

Lainé, "*Introduction au dr. int. privé*," i, pp. 128-130.

5. I have recently discussed at length the doctrines of Bartolus and Baldus in *Zeitschrift für internat. Privat- und Strafrecht*, iv, pp. 258, 340, 346. I have also published (*id.*, ix, p. 24) extracts from the "*Speculum*" of Durantis, from the "*Brevarium*" of Joannes Faber, and from the work of Albericus de Rosate. The articles have also appeared separately.

6. The formalism for which Bartolus has been reproached so prodigally is largely explained by his desire to facilitate newer views through reasoning suitable to the spirit of the time. Compare W. Engelmann, "*Die Schuldlehre der Postglossatoren und ihre Fortentwicklung*" (1895).

§ 22. Successors of Bartolus.

Lainé, i, p. 164.

The most prominent among the successors of Bartolus were Baldus and Salicet. These two Italian jurists also based their doctrinary discussions upon the law "*cunctos populos quos*."

I. Baldus (1327-1400) belonged to the school of Bartolus.

These two "*principes juris*" exercised an extraordinary influence upon the whole field of jurisprudence, ceasing only with the rising sun of the Dutch school.

1. To the question whether a minor or person under other disability can enter into valid transactions in a foreign country, Baldus also answers in the negative.
2. Conflicts in matters of succession are discussed interestingly in Nos. 85 and 86, wherein Baldus considers the case of a baron having castles in France and in Lombardy. He says that if a will were made according to the *jus commune*, all objects would fall to the *primogenitus*. In case of intestacy, however, the first-born would have to divide with the other next of kin, in France.
3. Baldus makes a small beginning for the theory of a *statutum mixtum* (Nos. 59 and 91).

II. As to Salicet (1363-1412):—

1. He supports the opinion of Bartolus that the substantive law applicable to contracts is that of the place where they are made.
2. The rights of a surviving husband to the estate of the wife are referred to the law of the last matrimonial domicile.
3. In matters of succession, Salicet makes the law of the deceased's domicile authoritative for all the property. This he applies to the case of a citizen of Lucca owning certain property in England and dying while sojourning there.

NOTES

Among other successors of Bartolus, the following are of importance:—

I. IN ITALY:—

1. Paul de Castre (Paulus de Castro). † 1441. *Consilia*.
2. Alexander (Alexander Tartagnus or de Tartagnis) 1423-1477. This jurist left a number of legal opinions in which the theory of Bartolus is taken as the basis. He wrote three volumes called "*Consilia*" (1595), annotated by Molinæus. Comp. Molinæus, "*Opera omnia*" (1681), iii, pp. 879-1018, "*notæ solennes*."
3. Rochus Curtius. † 1495.

II. IN FRANCE:—

1. Henri Bohic. 1310-1390. Argentræus calls his compatriot "Boich." Also mentioned by Molinæus, "*Tractatus commerciorum et usurarum*" (1577), p. 8.
2. Gui Pape. † 1487. Compare W. Schäffner, "*Gesch. der Rechtsverfassung Frankreichs*," iii, p. 162. Mentioned in Argentræus, No. 41.
3. Papon. 1505-1590. Compare Loysel's "*Institutes coutumières*," by Dupin and Laboulaye, i, p. cxii.
4. Masuer. † 1449. "*Practica forensis*."

5. Chassanæus (Bartholomæus a Chassenæo, 1480-1541). He wrote "*Consuetudines ducatus Burgundie*" (Paris, 1552, and Geneva, 1647). Cf. H. Pignot, "*B. de Chasseneux, premier commentateur de la Coutume de Bourgogne et président du Parlement de Provence, sa vie et ses œuvres*" (Paris, 1880).

6. Tiraqueau (Andreas Tiraquellus). 1480-1558. "*De legibus connubialibus et jure mariti*" (Paris, 1846). See also "*Opera omnia*," (1574), i-v (compare Lainé, i, p. 251).

V. THE FRENCH DOCTRINE OF THE SIXTEENTH CENTURY

§ 23. Transplanting the Doctrine to France.

Lainé, i, p. 269.

The feudal practice of applying the law of the territory to all transactions occurring within it (*coutumes réelles*) doubtless existed in France between the eleventh and fourteenth centuries; but the mollifying influence of the Italian doctrines made itself felt at least from that time on.

I. The rules of Bartolus underwent various changes in the course of the centuries. They must be known in order to understand the doctrines of the later jurists. The following maxim was established:—

"*statutum territorium non egegitur*," or

"*statutum territorium non porrigitur ad forenses*," or

"*statutum territorium se non extendit extra territorium statuentis*,"

or

"*efficacia statuti ad territorium statuentis restricta est*."

II. The effect of the rule is that the legislator has power to enact laws having force only within his own territory. But even this proposition was variously interpreted.

1. If we wish to express the thought that the law applicable to landed property is the law of the territory wherein it is situated, we say, "*statutum non porrigitur extra territorium*," meaning that the native laws do not apply to property elsewhere situated.

From the point of view, however, of the owner of property, dealing with it abroad, it was said, "*statutum de re porrigitur extra territorium*," i.e. local laws regarding property situated within the territory will be recognized also abroad.

2. As to the form of wills, the majority of jurists lay it down that the law of the place of execution shall govern and be recognized everywhere. It is expressed as follows, "*statutum*

disponens de solemnitatibus extendit se extra territorium," i.e. valid also as to property located abroad. Others of the same opinion express it, "*non porrigitur extra territorium statuensis.*" This applies to the case of a testator leaving property by will executed outside of the jurisdiction where the property is situated.

III. The theories prevailing in France may be best illustrated by a comparison between two prominent jurists, Argentræus and Molinæus, for in them is most clearly embodied the struggle between two great tendencies.

§ 24. Argentræus.

Lainé, i, p. 311.

De la Lande de Calan, "*Bertrand d'Argentré, ses doctrines juridiques et leur influence*" (1892).

Argentæus († 1590) was a renowned jurist of Brittany (*Britannia*). He considered the conflict of laws in his "*Commentarii*" while dealing with Art. 218 of the *Coutumes* of Brittany. This article presented the question whether the limitation against disposing by will of more than one-third of an estate to other than legal heirs applied also to property lying in other provinces.

I. In sharp conflict with Molinæus, Argentæus regarded the theory which had developed in Italy as wholly erroneous. The earlier authors he denominated as "*scholastici scriptores*," and says that out of "false principles" arose "still falser consequences." He especially ridicules the discussions of Bartolus in Nos. 16 and 24.

Argentæus attacked these "*scriptores scholastici*" with spirit, energy, and sarcasm. An historian (he wrote the history of Brittany), a jurist, and a legislator, he was a man of definite political convictions, although they were indeed restricted to conditions prevailing in Brittany. He resembles the modern states'-rights man who excitedly attacks the broader development of federal power. The horizon of Argentæus did not extend beyond Brittany; to its cause he consecrated his life.

According to his theory, the laws easily divide into three classes of unequal importance:—

1. The laws are *regularly* to be interpreted as *statuta realia* or laws of reality.

Argentæus, as the champion of feudalism, thus starts with the proposition that the laws of the territory are binding upon

all who enter into legal transactions or undertakings within its boundaries.

2. *As an exception*, laws are sometimes so bound up in the person as to accompany personality everywhere. We have a case of *statuta personalia*, therefore, when relating to the quality or position of the *person*.

This is the modest concession which Argentræus makes to the Italian School.

3. There are also *statuta mixta*.

The essential nature of this third class is that they follow the *rule* and in fact strengthen it. This class is composed of statutes dealing with the capacity or incapacity of a person to deal with property within the territory, the principal example being that of a person under age by his personal law, attempting to transfer immovables within a territory foreign to his personal law. The territorial law governs in these cases.

Argentræus was not wholly correct in saying that the "*scriptores scholastici*" entirely overlooked the *statutum mixtum*, for in the works of Baldus (Nos. 59 and 91) we already find a beginning, however modest it may have been. It is true, however, that Argentræus was the first who attempted to reduce the *entire* doctrine of the conflict of laws to this threefold division.

II. In valuing the doctrines of Argentræus, it must not be forgotten that they are largely a result of his political views. Molinæus maintained that the laws throughout the territory ruled by the king were of equal value, while Argentræus supported the autonomy of the provinces, especially that of Brittany.

III. The doctrines of Argentræus received no approbation in France; territorial independence was approaching its end, and the reign of Louis XIV was in sight. Even later, the expression "*Les coutumes sont réelles*" was often employed; but in regard to the status, to the form of legal business, and to the law of succession, the French view came to be the same as the Italian doctrine.

The significance of the doctrine of Argentræus is that it brought the question of international conflict under three *formulae* and declared all further examination into detail to be useless. Later (from 1727 onward) a return to Argentræus was made even in France; this was the year in which L. Boullenois published his book under the title: "*Questions sur les démissions des biens*," in which "*question sixième*" dealt with conflicts of law.

The doctrines of Argentæus, in the course of time, replaced those of Bartolus. They have unfortunately not yet lost all of their influence.

After the discussions of Argentæus became known, the theory of conflict took on *an entirely new phase.*

THE SUCCESSORS OF ARGENTÆUS (Lainé, i, pp. 342-388):—

R. Choppin, advocate in Paris, 1537-1606: *Commentaires sur les coutumes d'Anjou et de Paris; traité des privilèges des personnes vivant aux champs ou privilèges des rustiques.* Cf. Warnkönig and Stein, *Französische Staats- und Rechtsgeschichte*, 2d ed., ii, p. 131.

Georges Louet: *Recueil d'arrêts notables* (1602).

L. Charondas Le Caron (1536-1617): *Réponses ou décisions du droit français; mémorables observations du droit français, Pandectes ou Digestes.*

Pierre de l'Hommeau: *Maximes générales du droit français* (1614).

Job Bouvot, advocate in Dijon (1558-1636): *Commentaire de la Coutume de Bourgogne; Recueil d'arrêts et de notables questions de droit* (1623).

Julien Brodeau, advocate in Paris († 1653): *Notes on the Recueil d'arrêts of Louet.*

Claud Henrys, advocate in Forez (1615-1662): *Recueil d'arrêts* (1639).

Paul Chaline, advocate: *Méthode générale pour l'intelligence des Coutumes de France* (1666).

This author for the first time in eighty years discussed "*règles nécessaires pour montrer quelle différence il y a entre les dispositions personnelles réelles et mixtes*" (Lainé, i, p. 360).

Jean Marie Ricard, advocate (1622-1678): *Traité des donations entre-vifs et testamentaires; traité du don mutuel.*

Basnage, advocate in Rouen (1615-1695): *Commentaire de la Coutume de Normandie* (1677).

Denis Simon, *Bibliothèque historique des principaux auteurs du droit civil* (1692), containing: *Dissertation en quels cas les coutumes sont réelles, personnelles ou mixtes.*

Philippe de Renusson, advocate in Paris (1632-1699): *Traité de la communauté; traité du douaire; traité du droit de garde noble et bourgeoise* (1699).

Thaumas de la Thaumassière († 1712): *Commentaire de la Coutume de Berry* (1701).

Barthélemy-Joseph Bretonnier, advocate in Paris (1656–1722): *Œuvres de Henry, with Observations*.

Denis Lebrun, advocate in Paris († 1708): *Traité de la communauté; traité des successions*.

Eusèbe de Laurière: annotated edition of Loysel's *Institutes coutumières* (1710).

NOTES

1. Argentræus quotes Bartolus approvingly in No. 26.

2. I have lately discussed the doctrines of Argentræus and Molinæus in *Zeitschrift für internat. Privat- und Strafrecht*, v, pp. 363, 452, 554. Compare Fusinato in *Rivista italiana per le scienze giuridiche*, xxi, p. 184, and Örtmann in *Archiv für bürgerliches Recht*, xi, p. 189.

3. Rocco, *Dell' uso e autorità delle leggi* (2d ed., i, p. lxxix) speaks in most respectful terms of Argentræus (and Burgundus): "*Il dotissimo d'Argentré e il Burgundo . . . han lasciato su la materia regolo luminoso e alle bisogne civil sovente e sotto più rapporti adattate*."

§ 25. Carolus Molinæus.

Lainé, i, pp. 223, 257.

Brodeau, *La vie de Maistre Charles du Molin. Opera omnia* (Paris, 1681), pp. 1–60.

Molinæus (1500–1566) was both an advocate and professor. His aim was to accomplish a united kingdom of France with a uniform system of law. He was a man of great foresight, of broad views, and an internationalist of modern character. Cumbersome and passionate in style (a certain degree of temper is always a good sign of inward conviction), Molinæus attacked the school of Brittany and supported, in the main, the Italian doctrine. Before the researches of Lainé, it was widely believed that Molinæus was opposed to territoriality in its entirety; there are, indeed, certain passages in his annotations to Alex. Tartagnus that point this way. His main arguments are to be found at the traditional place, *i.e.* in the commentary to the law "*cunctos populos*" and in *consilium* 53. In his recapitulation he brings out the following:—

I. The forms of legal business must accord to the law of the place where the transaction occurs, whether it be in relation to contracts, judgments, wills, or other documents.

II. Up to that time, according to the doctrine of Bartolus, the validity and effect of contracts were determined by the sub-

stantive law of the place where they were made. Molinæus holds that this rule is much too broad. He emphasizes particularly that the intention of the parties should, in the first instance, be controlling. With this proposition, he placed the problem upon a new foundation. Molinæus deduces a *tacitus consensus* especially in sales and marriage contracts. If, for example, nothing upon the subject is mentioned in the marriage contract, then by reason of a *tacitus consensus*, the law of that place shall be applicable where the husband was domiciled at the time of making the contract. This applies also to property situated abroad. In this way Molinæus gives an extra-territorial effect to law in certain cases, through the theory of an implied consent of the parties.

III. Molinæus treats separately those laws which do not depend on the will of the parties, *i.e.* "*statutum quod disponit in his quæ non pendent a voluntate partium, sed a sola potestate legis.*" Here his analysis is twofold:—

(a) "*Semper inspicitur locus ubi res sita est.*"

By this is meant that a thing is governed by the law of the place where it is situated, no matter who the owner may be, unless the statute specially excludes its application to aliens.

(b) "*Statutum agit in personam et tunc non includit externos.*"

From this it follows, *e.g.*, that contracts of an alien minor would not be considered valid in France. So also with regard to persons under guardianship in a foreign country.

NOTES

1. It is highly interesting to observe the manner in which Molinæus opposes the one-sided emphasis placed upon the *lex loci contractus* in his "*Conclusiones de statutis*" (see *Zeitschrift für internat. Privat- und Strafrecht*, v, pp. 556 and 557).

2. Among the leading French jurists who dealt with this topic is also Coquille (1523–1603), an extraordinarily interesting and important figure in French jurisprudence, although his conception of the doctrines of the Italian School and of the interpretations of the statutes is incorrect. He strongly opposes the idea that the conflict of *coutumes* was an example of *realia*; he is not, however, in accord with Bartolus. He claims that the nature of statutory provisions must be kept in mind, and while he does not follow the division of *statuta personalia* and *realia*, he agrees that the "*spirit*" of this classification should be considered.

He wrote "*Coutumes de Nivernois*," *Œuvres*, 1703. Compare Lainé, i, p. 297; M. Dupin, "*De la Coutume de Nivernois*" (1864), Introduction, pp. 1 *et seq.*

VI. THE DOCTRINES OF BELGIUM AND HOLLAND IN THE SEVENTEENTH CENTURY

§ 26. The Adoption of the Theories of Argentræus.

Lainé, i, p. 401.

The political situation of the Netherlands was just as though specially prepared for the reception of the doctrines of Argentræus. The small communities existing there were so jealous of one another that it finally became necessary to promulgate the *coutumes*. This was done through an edict of 1531. Under such conditions, the principles of Argentræus became extremely welcome, although certain Netherlanders, such as Nicolas Everhard, 1462-1532, and Petrus Peckius, supported the theories of Bartolus and Baldus.

In 1611, a most significant edict was issued (Lainé, i, p. 400):—

"We ordain: that where there is a diversity in respect of testamentary dispositions, between the law of the testator's domicile and that of the situation of his property, the laws and usages of the latter place shall govern in regard to the nature of the property, whether it may be disposed of, at what age and with what form and solemnity."

Based upon this, a will was declared invalid that had been made in Brussels in 1619, so far as concerned property situated in Milan, because the testator had followed the form prescribed by the law of the place where it was made. After 1634, this edict was interpreted so as to refer only to forms required in the interior, and not abroad, and to make the form of the place where made, suffice in the latter case. In truth and fact, this amounted to a repeal of an entirely clear, though erroneous, edict.

The doctrines of the Dutch School may be briefly recapitulated as follows:—

I. The prevailing opinion among the jurists was that the conflict of laws was a subject to be dealt with by International Public Law; further, that every local commonwealth was sovereign in law and had no duty imposed upon it to observe foreign law. In this way the remotest conclusions were drawn from the reasoning of Argentræus, even such as he himself would not have drawn.

II. When foreign law *is* observed, it takes place by reason of

a voluntary acceptance of it upon the basis of international courtesy. This is the theory of "*comitas*" or "*courtoisie internationale*."

Argentæus was thus outbid in another direction; whereas he had permitted a small field of questions to remain, *by way of exception*, subject to the rule of personality, the general rule of territoriality was now made to apply *without* exception.

III. The Dutch jurists were of the view that the status of a person was fixed by local law. Although the status of minority and majority, as established by the law of an alien's native state, was actually respected in the Netherlands, it was essentially out of a self-interest, finding its expression in the aforementioned doctrine of *comitas gentium*.

In this way the theory of the *collisio statutorum* degenerated to the rule of territoriality. That which the earliest Italian theory had worked out so laboriously was completely destroyed through the teachings of the Dutch School.

§ 27. Its Individual Representatives.

Lainé, i, p. 395.

Rolin, i, pp. 72-83.

Weiss, iii, p. 31.

A closer examination of the great array of Belgian and Dutch jurists who have treated the question of the *collisio statutorum* reveals that considerable differences exist between them. The basic principles are, however, the same.

1. A very interesting and well-written work is given us by *Burgundus*. His tendencies are more feudal than Argentæus himself, and he goes as far as to say that the form must accord to the law of the *locus* of an object. This explains the edict of 1611 already cited.

Burgundus (1586-1649) wrote a work entitled *Ad consuetudines Flandriæ aliarumque gentium controversiæ*.

2. Christinæus (1543-1631) published, *Commentaria ac notæ in leges municipales Mechlinien secund Practicarum quæstionum rerumque in supremis Belgarum curiis actarum et observat*.

3. Christian Rodenburg (Utrecht 1618-1668) wrote, *De jure conjugum*, preceded by, *De jure quod oritur ex statutorum vel consuetudinum diversitate* (Utrecht, 1553, and Antwerp, 1676).

Compare Lainé, ii, pp. 49-52.

4. P. Voet (1619–1677). He wrote: *De statutis eorumque concursu liber singularis*. Compare Edition *Leodii* (1700), from p. 53. See also his further works: *Mobilium et immobilium natura modo academico et forensi ad evidentiore[m] juris statutar[is] intellectum strictim proposita* (Utrecht, 1666), especially chaps. xii, xiii, and xxiii. Compare Lainé, ii, pp. 97, 172, 387.

5. J. Voet (1647–1714, son of the former). He wrote, in *Commentarius ad Pandectas*, vol. i, a treatise: “*De statutis*” (*liber i, tit. iv, pars ii*).

Compare Lainé, ii, pp. 99, 172, 388. “*Jean Voet fut le vrai fondateur de la doctrine hollandaise.*”

6. Abraham a Wesel. He wrote, *Tractatus de connubiali bonorum societate* and *Commentarius ad novellas constitutiones Ultrajectinas*.

7. Joannes a Sande († 1638). He published, *Decisiones Frisicae*. Especially important are:—

- | | |
|--|--|
| (a) <i>Liber i tit. xii definitio v.</i> | (c) <i>Liber iv tit. viii definitio vii.</i> |
| (b) <i>Liber ii tit. vi definitio x.</i> | (d) <i>Liber iv tit. i definitio xiv.</i> |

Compare also *Opera omnia juridicia Joannis et Frederici a Sande*.

8. Stockmans (1608–1671). He published, *Decisiones curiae Brabantiae*. See also, *Opera omnia*.

Decisio ix. The Edict of 1611 mentioned at § 26 *supra* is here discussed. See also, l, lx, cxxi, cxxv, cxxvi, cxl, cli.

The Dutch-Belgian jurists above mentioned represent a tendency that was wholly fatal to the science of the *collisio statutorum*; they all have the same trade-mark of *comitas*. Nicolas Everhard (“*Topica de locis legalibus et Consilia*,” i et ii) and Petrus Peckius (“*De testamentis conjugum*,” e.g. book iii, chap. xvii and book iv, chaps. xxviii–xxxvii) are the only ones who support in part the views of Bartolus (Lainé, i, pp. 396 and 397). The Netherlands school lacked a man of the stamp of Molinæus.

§ 28. Ulricus Huber in Particular.

Lainé, ii, pp. 183–188.

A. Weiss, iii, p. 37, Note 4.

Ulricus Huber (1636–1694) was of Swiss descent, probably from Zurich. He was the son of Henricus Huber. On November 30,

1657, he was made Professor at Franeker (an old Dutch university) and was first "*professor eloquentiæ et historiæ*," afterward "*professor institutionum*." Although three times called to the University of Leyden, he declined and remained at Franeker. In 1657 he was made "*supremæ curiæ senator*," but in 1682 he returned to academic work, "*ad meas veteres musas*," as he says in *Oratio* i ("*Huberi Opera minora Trajecti ad Rhenum*," 1746). He then taught "*jus civile, jus publicum et jus statutarium*."

I. By means of his *tria axiomata*, Huber placed our topic completely in the field of politics, with International Public Law as its basis. Logic is not offended by these *axiomata*, but from the point of view of jurisprudence they have the pernicious quality of leading to nothing.

Unfortunately there are still many modern jurists who place their doctrines upon the same basis as Huber, and especially is this true of some of the theories prevailing in England and America. It was said for a time, that the Netherlands cleared the way for International Private Law, or in the words of Foelix, "*les jurisconsultes des Pays-Bas ont frayé la route*" ("*Traité du droit international privé*," Paris, 1843, p. 9; 4th ed., 1866, i, p. 15). As a matter of fact, the Dutch School lifted International Private Law from the plane of justice to the indefinite and variable standard of comity, a basis that was almost fatal to its development. It caused retrocession instead of progress. Even to-day we still feel the effects of its erroneous doctrines. It was the jurists of the Netherlands who, through the medium of the doctrine of comity, prepared an ambush against progress in this department of jurisprudence—this alone is the truth and all else a myth. Of course they simply built upon the arguments which Argentræus laid down with so much energy, and it is to him that we must finally ascribe all the doctrines of this school.

II. Ulricus Huber wrote, "*Prælectiones juris romani et hodierni*." In part ii, there is a short treatise entitled: "*De conflictu legum diversarum in diversis imperiis*." At the very outset, Huber declares that the laws of a state have no force outside of the territory, but are good for all persons found within it. This axiom is modified only by the friendly intercourse existing between states and the *comitas* which they observe; in consequence, the application of foreign laws is permitted in so far as it is not repugnant to

the sovereign power, or the rights of the subjects of the internal state.

Notwithstanding these rules, he refers to the laws of the place where a legal transaction was entered into, in order to determine its validity, just as he refers the qualities of persons to the law of their domicile. It is plain that these results cannot be deduced from the principles which he postulates. Legal relations in regard to immovables (*e.g.* testate and intestate succession, contracts) are referred to the law of the place where the thing is, or the *lex rei sitæ*.

In the work of this author entitled "*De jure civitatis*," etc., there is a paragraph (*lib. iii, sec. iv, cap. i*) entitled: "*De his quæ exteri sibi invicem debent*," in which the rules ("*positiones*") are formulated as follows:—

"*Prima sit: leges cujusque reipublicæ tenent obligantque cunctos eidem imperio subjectos nec ultra.*

"*Secunda: pro subjectis habentur, quicumque in territorio cujusque civitatis reperiuntur, quamdiu illic commorantur.*

"*Tertia: summæ potestates cujusque reipublicæ indulgent sibi mutuo, ut jura legesque aliarum, in aliarum territoriis effectum habeant, quatenus sine præjudicio indulgentium fieri potest.*"

NOTE

In *Zeitschrift für internat. Privat- und Strafrecht* (viii, p. 189) I have published the discussions of Huber in his "*Praelectiones*" under the title, "A Specimen of the Dutch School."

VII. THE DUTCH SCHOOL IN GERMANY

§ 29. The Statutory Theory in Germany.

Riccii, *Zuverlässiger Entwurf von Stadtrechten oder Statutis*, etc. (Frankfort and Leipzig, 1740). Compare especially p. 21.

The division of the *statuta* into *personalia*, *realia*, and *mixta* found favor in Germany too, although certain jurists recognized it only in part and, as for the rest, ignored it or opposed it.

The following propositions were laid down by the Supreme Court of the Empire in the sixteenth century:—

I. With reference to the person, the force of the laws is limited to the territory. From this it was concluded that personal capacity to deal with property is governed by the *locus* of the thing and not by the law of the owner's domicile.

II. Rights in property are to be determined solely by the laws of the territory wherein the property is situate. This was embodied in the expression, "*statuta de rebus non extenduntur ad res extra territorium sitas*," which applied as well to separate articles of property as to property considered as a unit, pursuant to the Roman conception of "universal possession." Descent in intestacy and by will is governed by the law of the territory in which the property lies, and not by that of the deceased's domicile. Movables were sometimes excepted, with the maxim, "*mobilia ossibus inhaerent*."

III, If the form of a transaction is in accordance with the law of the place where it was concluded, it is to be considered valid everywhere : —

"*statutum disponens circa solemnitatem extendit se extra territorium*."

The views stated at I-III remained in force also during the seventeenth century. Thus we again have the theory of real, personal, and mixed laws, though in another form than that supported by Argentræus.

Andreas Gaill († 1587), in his work, "*Practicarum observationum tam ad processum judiciarum præsertim imperialis cameræ quam causarum decisiones pertinentium libri duo*" (Cologne, 1697), distinguishes the cases according to whether the statute provides "*de personis*," "*de rebus*," or "*de solemnitate actus*," respectively. He makes its extra-territorial effect dependent upon this test. The formula of *statuta mixta* was opposed. It was replaced generally by the *solemnitas actus*.

IV. These doctrines had their effect in positive legislation, especially in the *Codex Maximilianus Bavaricus*.

NOTES

The *Codex Maximilianus Bavaricus Civilis* (1756) in *th.* 1, *cap.* 2, § 17, is to the following effect : —

"In the case of a conflict of laws, consideration is first to be given to particular liberties, then to local customs, laws, and ordinances, then to general parliamentary provisions, and finally to the common law."

In so far as rights, statutes, and customs differ "*in loco jurisdictionis*," "*delicti*," "*rei sitæ*," "*contractus*," and "*domicilii*," the court in which the matter is to be decided shall refer to and recognize the customary laws of the place where a transaction took place, so far as concerns its form; in matters "*in mere personalibus*," the law of the domicile; and finally "*in realibus vel mixtis*," the *lex rei*

sita, without consideration as to whether property be movable or immovable, corporeal or incorporeal. Punishment of crime, however, shall be administered according to the law of the place wherein it was committed.

Further, in *th.* 3, *cap.* 12, § 1:—

"... In matters in dispute in intestacy reference is not to be had to the law of the place of the intestate's decease, but to that of the place wherein the property is situated, except in purely personal claims, in which case, to the law of the deceased's domicile."

Similar provisions were contained in the Bavarian Court Rules of 1753 (xiv, § 7, No. 8) and of 1816 (i, No. 3).

Besides Gaill, the following also may be mentioned:—

1. J. Mynsinger († 1588). He wrote, *Singularium observationum imper. Camerae*. Compare especially *Centuria v, observatio xix: consuetudo vel statutum de rebus vel personis disponens an extra territorium extendatur?*

2. D. Mevius († 1670). He wrote besides *Decisiones* (i and ii) a commentary: *In jus Lubecense*.

3. W. A. Lauterbach (1618–1678). He wrote: *Dissertationes academicæ*. Compare *tom. iii: De societate bonorum conjugali, cap. ii*, Nos. x–xvii, especially xiii and xiv.

4. Hertius (1652–1710) wrote:—

(a) *Commentationes de selectis et rarioribus argumentis ex jurisprudentia universali* (1737). *Sectio iv: De collisu legum positivarum inter se.*

(b) *Responsa, concilia et decisiones*.

N. Rocco: *Dell' uso e autorità delle leggi*, 2d ed., i, lxx, criticises Hertius as follows:—

"N. Ersio . . . ha segnate alcune regole utili e tali che comprendono la soluzione di molti casi singolari. Nientedimeno, ei non ha che sol gettate le nude e grezze fondamenta della scienza." Perhaps history will excuse him somewhat in view of the fact that his life was much embittered through having a remarkably quarrelsome wife (E. Landsberg, *Geschichte der deutschen Rechtswissenschaft*, part 3, p. 38).

5. Hommel: *Rhapsodia quæstionum in foro quotidie obvientium* (3d ed., 1769). *Observ.* 409.

6. Hofäcker (1749–1793): *Principia juris civilis romano-germanici* (2d ed., 1800), i, §§ 137–143. He supports certain "*regulae generales circa collisionem statutorum*," and refers to Argentræus, Burgundus, Rodenburg, Cocceji, Hert, and Meier.

7. Riccii: *Zuverlässiger Entwurf von Stadtrechten oder Statutis* (1740). Compare pp. 315, 325, 437.

(a) Laws giving persons a certain character or quality (pp. 520 *et seq.*).

(b) Laws providing a certain form or solemnity for transactions (pp. 528 *et seq.*).

(c) Real statutes or laws in relation to real property (pp. 542 *et seq.*).

(d) Laws relating to movables (pp. 591 *et seq.*).

8. Henricus de Cocceji (1644–1719). In point are *Disputatio 54: "De fundata in territorio,"* etc., in his "*Exercitationes curiosæ*" (1722), i, pp. 680–746, and *Disputatio 56: "De concursu plurium jurisdictionum,"* i, p. 747. *Disputatio 54* also appeared separately as "*Altera editio emendatior et auctior*," with the author's name appearing as Iconius. This is explained by the custom prevailing in the seventeenth century, of having one of the students act as "respondent" to a

dissertation (compare Stintzing, *Geschichte der deutschen Rechtswissensch.*, part ii, p. 27, and part i, p. 152).

9. Samuel de Cocceji, son of the former, who published a résumé of his father's work in *Jus civile controversum*; cf. *lib. ii, tit. i: "De jurisdictione," quaestio xxiii* (Frankfort and Leipzig, 1740).

10. Caspar Ziegler (1621-1690): *De judicium officio et delictis tractatus moralis* (4th ed., 1754), *Concl. xv*, pp. 254-297.

11. J. G. Meier: *De statutorum conflictu eorumque in exteros valore* (Giessen, 1715, *Diss.*), pp. 14, etc.

12. D. Franc. Alef († 1763). He wrote, *Dies academici* (Heidelberg, 1753), in which occurs *Dissertatio iv: "De diversorum statutorum concursu eorumque conflictu."* He opposes the ordinary statute theory and rests almost entirely on territorial views. He applies the law of the territory to the status and capacity of aliens and to the forms of legal instruments made within the territory (Nos. 28-31). In the case of contracts, the laws of the domiciles of the contracting parties, as well as the *lex loci contractus*, must be satisfied upon the question of capacity.

VIII. THE DUTCH SCHOOL IN ENGLAND AND AMERICA

§ 30. Attitude of England and the United States of America.

Harrison, in *Journal de dr. i.*, vii, p. 429.

Lainé, *id.*, xxiii, p. 484.

Story, §§ 10-11.

At the time when Continental Europe possessed an array of varying laws and statutes, England had an almost uniform law through the blending of the Anglo-Saxon and Norman customs. There had arisen in England a "statute law" in contradistinction to the "common law" and complementary to it. But we find in neither body of law rules laid down as to the applicability of the internal law to international disputes. Probably it was always considered applicable, for as late as 1753 a case occurred in which a demand for the application of foreign law was considered as something entirely new and surprising. This was the case of *Scrimshire vs. Scrimshire*, 2 Haggard's Consistory Reports 407.

Foreign law gradually found an introduction through the practice of the ecclesiastical courts and courts of admiralty, a result which was assisted by the fact that many English and Scotch jurists completed their educations in Holland. Another important element was the fact that William III (1650-1702) simultaneously held the positions of king of England and stadtholder of Holland.

I. The Dutch School exercised a great influence in England, and, through English authorities, later also in America. As the

American author Story (§ 10) well says, we have no early theoretical discussions from England. We may add that England never underwent the early Continental European development of the statutory conflict at all. With the growth of the science of International Private Law, this nation took the doctrines as they had been developed by the Dutch School. Story himself was largely influenced by Ulricus Huber.

II. In the light of this explanation, we easily understand the following tendencies which are manifested in some respects even to this day : —

1. the emphasis placed upon territorial sovereignty, — territorial law (as distinguished from the law of the domicile) is largely applied in England and the United States ;
2. the acceptance of the maxim of Hugo Grotius : "*Qui in loco aliquo contrahit tamquam subditus temporarius legibus loci sub-jicitur*" ("*De jure belli ac pacis*," book ii, chap. 11, sec. 5, No. 2) ;
3. the support given to the doctrine of comity. It is true, however, that even in England and the United States, *modern* authors are opposing the unlimited operation of feudal ideas in this department of law.

NOTES

1. Story, § 10, "The subject . . . seems to be of very modern growth in that kingdom (England) and can hardly as yet be deemed to be there cultivated as a science, built up and defined with entire accuracy and decision of principles." Dicey says, p. 726, "English judges, when, about a century and half ago, they were for the *first time* called upon to deal frequently with the conflict of laws . . ."

2. Lainé, in *Journal de dr. i.*, xxiii, p. 486, maintains (and with him Lawrence, *Commentaire sur Wheaton*, iii, p. 61) that the first case before an English court involving a question of International Private Law took place in 1753. "The judge who rendered this opinion . . . having to decide which law should be observed in determining the legal age of marriage of two persons marrying in France, decided that it was the French law that governed, as *Gaill*, a German author of the sixteenth century, said that the form of transactions followed the law of the place where they occur. After the first attempts of this kind, efforts were made by jurists of the United States to found a system, as conflicts of law were becoming numerous there." Lainé says further (p. 484), "At a period when the multiplicity of statutes or customs were exciting conflicts of law in Europe, especially in Italy, France, Germany, and the Netherlands, for the solution of which an array of rules were growing up, denominated the statutory theory, *England*, wherein the Anglo-Saxon customs were becoming blended with the Norman, *enjoyed a system of laws almost uniform.*"

§ 31. The Influence of Feudalism in Modern Times.

I. How important Huber's influence was upon the English system is clearly manifested in the work of Story, in the first edition of which (1834) he lays down the following rules:—

1. Every nation has exclusive sovereignty and jurisdiction within its own territory. All persons and things within the domain are subject thereto.
2. The laws of a nation cannot be made binding upon persons or objects without its domains.
3. The question as to what authority the laws of one country have in another depends entirely upon the disposition of the latter. If both laws are silent upon the question, the court must establish a kind of *jus gentium privatum*. This is founded upon the convenience of the nations and is *ex comitate* and not *ex jure*.

II. The same spirit is manifested in the work of Burge, "Colonial and Foreign Laws generally, and in their Conflict with each other and with the Law of England" (London, 1838). He lays down thirty-one rules, from which I extract the following:—

1. The compelling force of the laws is restricted to the territory of their enactment and to subjects of the state.
2. This subjection applies not only to those domiciled within the territory, but also to every one temporarily sojourning therein, possessing property therein, or who is a party to a suit therein.
3. Through an understanding between the nations and to meet the requirements of intercourse, each state recognizes the force of foreign law, when the rights of its own subjects, or of aliens, are dependent thereon;
4. never, however, when the application of foreign law prejudices the authority of the state or the interests of its subjects.
5. If a law contains fixed provisions as to persons and things, it is to be considered as a statute real, in case of doubt.

NOTES

Story admits, in § 10, that the topic of International Private Law has really not been treated at all by English jurists. He intimates, however, that the writings of the Continental authors are not of really great merit: "Their works abound with theoretical distinctions, which serve little other purpose than to provoke idle discussions, and with metaphysical subtleties which perplex, if they do not confound, the inquirer."

But Lainé well says, in *Journ. de dr. i.*, xxiii, p. 486: "The doctrine of Story reproduces exactly that of the Hollander, Huber. *It is in reality no more than a paraphrase.*"

IX. THE STATUTORY PROBLEM IN SWITZERLAND

§ 32. A Recapitulation.

Leu, *Eidgenössisches Stadt und Landrecht*, i, pp. 41-44.

Rahn, "Über die Kollision gleichzeitiger Gesetze im Civilrechte, etc.," in *Monatschronik der zürcher. Rechtspflege* (1838), xi, pp. 332-335.

I. Race law held sway in Switzerland for many centuries. About the eleventh century fiefdom arose, and with it, all law except that of communes and municipalities went out of effect. Territoriality prevailed. It must not be understood, however, that all the former tribal laws fell away with the rise of the feudal system; but here, as elsewhere, the force of tribal law was no longer based upon the conception of race individuality. It rested upon the adoption of some particular system within a certain territory, either by express sanction or as customary law.

Authorities are sparse. Even in later times, we have only Leu to refer to. He treats our topic under the title "*Zusammenstossung der Gesetze*" and bases his doctrines more particularly upon those of Cocceji in "*De fundata in territorio alieno jurisdictione*."

II. Somewhat later, concordats or intercantonal treaties came into effect:—

1. upon relations of guardianship and tutelage as affecting persons domiciled, of date July 15, 1822 (Snell, "*Handb. des schweizer. Rechts*," i, pp. 231-233);
2. upon testamentary capacity and succession, of the same date (Snell, pp. 233-235);
3. upon the solemnization of marriage and certificates of consummation, of date July 4, 1820 (Snell, pp. 221-223);
4. upon process in divorce, of date July 6, 1821 (Snell, pp. 235-236).

All these concordats support the *lex originis*. They went out of effect in 1891 with the promulgation of the Federal Statute upon Civil Rights of Persons Domiciled and Sojourning (*N. & A.*).

X. SUBSEQUENT INFLUENCE OF ARGENTRÆUS IN FRANCE
DURING THE EIGHTEENTH CENTURY

§ 33. The Present Significance of Reality and Personality.

Lainé, i, p. 413; ii, p. 24.

The principal French authors of this period are the following:—

1. Froland († 1746), advocate in Paris. He wrote two volumes entitled, *Mémoires concernant la nature et la qualité des statuts, diverses questions mixtes de droit et de coutumes et la plupart des arrêts qui les ont décidées*.

2. L. Boullenois (1680-1762). He wrote:—

(a) *Questions sur les démissions de biens* (1727). *Question sixième*, pp. 81-168.

(b) *Traité de la personnalité et de la réalité des lois coutumes ou statuts par forme d'observations*.

3. Bouhier (1673-1746). He wrote two volumes entitled, *Les coutumes du duché de Bourgogne* (1742).

I. The doctrines of Froland, Boullenois, and Bouhier rest upon the following propositions:—

1. The laws may be classified into *statuts réels* and *statuts personnels*.
2. The reality of the laws is the prevailing rule; the personality of certain laws is, however, not a mere exception.
3. Real laws are the result of feudal *coutumes*; the personality of certain laws is demanded in the interest of justice.

In this way French authors came to designate as personal such laws as Argentræus had considered real. They were influenced by two ideas, viz.:—

- (a) that there are certain laws which are *intended* to apply only within the local state;
- (b) that the various states *owe it to themselves* to grant concessions to one another in the application of private law.

Thus a part of the Italian and a part of the Dutch doctrine were adopted in France. The result was a reduction in the number of statutes interpreted as real. In discussion of detail, Froland enunciates the maxim, "man is more noble than property, which, in fact, was created for him alone." This was just the contrary of Burgundus's theory. It was intended to destroy the rule, "*les coutumes sont réelles*."

In addition to the authors mentioned, the following are also of importance:—

- (a) Pothier: *Traité de la communauté*. In "*article préliminaire*," many of the views of Argentræus and Molinæus are indorsed. Pothier still exercises great influence in the jurisprudence of Lower Canada relating to our topic.

(b) Aguesseau, Chancellor of France: *Œuvres* (ed. Pardessus), v, pp. 256-258, 260-262; xii, p. 399.

(c) Merlin: *Repertoire* (cited in Mailher de Chassat, pp. 32-33).

II. These authors also adopt Argentræus's classification of the laws into real and personal, though there are minor disputes among them individually. Bartolus is still referred to: on the one hand, to ridicule him on account of his questionable formula in regard to succession; on the other, to emphasize the necessity for new theories. Froland especially was convinced that the conflict of laws had not received adequate treatment as yet. All in all it was the spirit of Argentræus which celebrated a belated triumph in France, though his doctrines had become modified in the lapse of time. *The statutory theory had entered a new phase.*

III. The French Civil Code reflects the influence of this period in Art. 3, which provides:—

"Laws of police and public order are binding upon all persons within the territory.

"Immovables, even though possessed by aliens, are governed by French law.

"Laws relating to the status and capacity of persons apply to French persons, even though in a foreign country."

XI. DOCTRINES OF THE NINETEENTH CENTURY

The Old and the New Rules

§ 34. The Statutory Theory in Germany.

Glück, *Pandekten* (2d ed., 1787), i, pp. 398-403.

Wening-Ingenheim, *Lehrbuch des gemeinen Civilrechts* (4th ed., 1831), ii, §§ 22-24.

Thibaut, *System des Pandektenrechts* (8th ed., 1834), i, § 38.

Mühlenbruch, *Lehrbuch des Pandektenrechts* (1835), §§ 72 and 73.

Vangerow, *Pandekten*, i, § 27.

Keller, *Pandekten*, § 12.

Kierulff, *Theorie des gemeinen Civilrechts* (1839), i, pp. 73-82.

Eichhorn, *Einleitung in das deutsche Privatrecht* (3d ed., 1829), §§ 34-37.

Mittermaier, *Grundsätze des gemeinen deutschen Privatrechts* (7th ed.), i, §§ 30-33.

Hillebrand, *Lehrbuch des deutschen Privatrechts* (1849), § 13.

Walter, *System des deutschen Privatrechts* (1855), §§ 39-51.

1. *The Old Rules*

In Germany the view was maintained that the threefold classification of the laws had become customary law. This idea was

supported especially in the works of *Thibaut* and *Kierulff*. Among authors individually, however, there was considerable disagreement in the practical application of this formula.

Thibaut ("*Pandektenrecht*," i, § 38) lays down the following rules "in conformity with practice":—

1. The status of a person is in all legal matters to be referred to the laws of that forum before which he is regularly to be cited (*statutis personalibus*), and must be judged accordingly also abroad, unless the personal statute of the foreign state places him under a disability.
2. *Statuta mixta* are applicable as to the form of procedure, the form and validity of a legal transaction, or the determination of its effects; also to penal offences. That is to say, the laws of that place are applicable where the action is to be prosecuted, the transaction completed, or the offence committed.

To this Thibaut adds, that a transaction otherwise valid according to the *statutis mixtis*, will be held invalid in the forum of the domicile, if conducted in fraud of the native law.

3. If the laws of a place wherein *immovable* property is situated make any provision in respect of things generally, such laws (*statuta realia*) will be applicable to that kind of property.

As to *movable* things, personal laws apply, unless the laws of the place where they are situated are expressly made applicable to them.

Kierulff ("*Theorie des gemeinen Civilrechts*," i, pp. 73–82) also relies upon practice in laying down that the court must determine whether the law to be applied concerns a person, a transaction, or a thing. This test will point out the concrete system of law applicable.

1. If the case concerns a *person*, the laws of that place are applicable in which the person is generally subject to jurisdiction, *i.e.* regularly the law of the domicile (*statuta personalia*).
2. If the case concerns a *thing*, the laws of that place are applicable wherein it lies (*statuta realia*).
3. If the prevailing incident of a case is a *transaction*, or expression of the will, the laws of that place are applicable wherein it was completed (*statuta mixta*).

As is manifest from the extracts cited, the question of the application of the laws is made to depend upon the forum.

Each author gives the topic a slightly different coloring. It is, however, unnecessary to go into details. We need only remark

that the doctrine as thus taught was taken over into the Prussian State Law (*Landrecht*), in force until 1900. R. Leschinsky ("Grundriss des preussischen Privatrechts," 1896, i, p. 31) defines the threefold classification as follows:—

Personal statutes are those laws which provide principally upon the rights of persons as such.

Real statutes are those laws which treat of immovables.

The conception of *statuta mixta* is a varying one. According to one view, it embraces those laws which apply to transactions; according to another, those which regulate the relations of persons to things.

2. The New Rules

1. Schäffner ("*Entwicklung des internationalen Privatrechts*," 1841) advances the following as the basic principle:—

"Every legal transaction is to be judged according to the law of the place where it came into existence."

2. Schmid ("*Die Herrschaft der Gesetze, nach ihren räumlichen und zeitlichen Grenzen*," 1863) lays down the following (p. 28):—

"The application of foreign law can be considered justifiable only when:—

- (a) it is necessary for the maintenance of international intercourse between private persons, and
- (b) no disturbance is caused thereby to public order, so as to injure legal interests of a higher nature than those of international intercourse."

This formula is a weak imitation of the doctrines of the Dutch School.

3. The Modern Spirit

§ 35. Various Doctrinary Systems of the New Theory.

Wächter, *Civ. Archiv* (1841 and 1842), xxiv, pp. 230-311; xxv, pp. 1-60, 161-200, 361-419.

Thöl, *Einleitung in das deutsche Privatrecht* (1851), pp. 168-190.

Savigny, *System* (1849), viii, pp. 121 *et seq.*

I. The writings of *Wächter* are of particular importance because they bring out sharply the uncertain and divergent conclusions of the statutory theory. So far as concerns positive results, the rules supported by *Wächter* may be stated as follows:—

1. It is the duty of the court to determine whether the positive law of its own country does not contain an express rule of conflict upon the question. If so, this law is applicable (*Civ. Archiv.*, pp. 239-240, and 261).
2. If no such express rule of conflict is to be found, the court must examine into the spirit and tendency of the laws, especially those of its own country, treating objectively of the situation before it (pp. 261-262). This elastic formula has recently been reasserted by von Wyss (*Zeitschrift für schweizer. Recht*, ii, p. 37).
3. When no certain determination of a question is to be deduced from the spirit, tendency, or significance of a law, the court, when in doubt, must apply the law of the land (p. 265).

These rules recur in Wächter's "*Pandekten*," i, pp. 164-167.

There can be no doubt that the court is bound by the law of the land, especially by its rules of conflict. On the other hand, the second and third rules of Wächter are clearly based upon a misconception. If the matter is one of International Private Law, the court must respect *the rules of application* contained in the law of the land, but it is entirely incorrect to provide that it should apply *internal* private law to an issue that is *foreign*. The substantive law which shall be applied to an international dispute is not to be determined through the spirit and tendency of the domestic private law, but through the spirit and tendency of the domestic rules of conflict.

Thöl says that the court must primarily apply its own laws, — what has been said above also applies to this. As for the rest, this great dogmatist believes that the will of every system of law which could possibly apply should be examined to determine whether they do not yield *inter se*. In answer it may be said that, as a rule, it is impossible to determine what such a "will" actually is.

III. An entirely new formula was advanced by Savigny to the following effect: —

The laws of that jurisdiction must be referred to, to which the issue belongs, or is subject, according to its peculiar nature, *i.e.* wherein it has its seat (viii, pp. 28, 108). This "seat" lies: —

1. at the domicile (for status, succession);
2. at the place where immovables are situated;
3. at the place of performance (in contracts).

The foundation of Savigny's theory lies in an international common interest (*Gemeinschaft*) supposed to exist between the nations (p. 27).

In connection with this formula Savigny excepts two classes of cases in which foreign law is not to be applied—so that, as to those, each state is completely shut off by itself :—

1. Laws of a strict coercive nature (viii, pp. 34–37, 160–162). In this category belongs, for example, the case of a Turk demanding protection for his harem in Europe ; the court of a Christian state would not recognize such a right of protection, because subversive of the principle of monogamy. Further, a law placing a limitation upon the acquirement of land by members of a particular religious faith would apply to alien as well as native members of that faith.
2. Legal institutions of a foreign state, not recognized in the local state and therefore not the basis of a legal claim in such state. In this category would belong slavery, the right of imprisoning servants, the right of the husband to chastise the wife.

§ 36. Triumph of the New Doctrine.

Windscheid, *Pandekten*, § 34.

Gerber, *Deutsches Privatrecht*, § 32.

Unger, *System des österr. P. R.*, 4th ed., i, p. 162.

I. The reasoning of Savigny upon the “seat” of issues was immediately adopted by the most prominent jurists, such as Windscheid and von Bar. The Germanists were especially partial to it. Unger accepted it along with both limitations upon the application of foreign law.

There were also certain modifications proposed :—

1. By Bornemann, in “*Erörterungen im Gebiete des preuss. Rechts*,” p. 70 :—

Every issue is to be determined by the laws of that jurisdiction to which, according to its nature, it belongs or is subject. This jurisdiction is to be discovered by referring to the parties, the subject-matter and the transaction with its results, and thus that law determined which is applicable to the relationships intended to be established.

2. By Böhlau, in “*Mecklenburgisches Landrecht*” (1871), i, p. 430.

II. Savigny's doctrine was also reflected in the provisions of certain codes, as, for example :—

1. the Saxon Civil Code, §§ 10, 11, 19 ;
2. the Code of Private Law of the Canton of Zurich, §§ 1-7 ;
3. the Private Law of Livonia, Esthonia, and Curland (1864), Introduction, § xxxv.

4. *The Old Tendencies as displayed in the Doctrines of England and America*

§ 37. Territoriality in Modern Times.

Pütter, *Das praktische europäische Fremdenrecht* (1845).

L. Pfeifer, *Das Prinzip des internationalen Privatrechts* (1851).

I. At every opportunity, the maxim "*omnes consuetudines sunt reales*" advances again into the foreground. This has proved possible even in Germany, notwithstanding the discussions of Wächter and the refining influence of the doctrines of Savigny.

Thus Pütter says that the judge is wholly and without exception bound by the law of the land ; that he would be violating his duty, the laws of the state and public order, were he to judge any issue brought before him by any other law than the local law. Pütter does not even admit that an alien's capacity to act is to be determined by the law of his own country ; on the contrary, the local provisions upon the status are held controlling upon all those residing or transacting business within the domain. Every state must be jealous of its sovereignty.

II. Pfeifer outlines the doctrines of Savigny in his treatise and then adds that there is but *one* suitable rule, viz. :—

The judge must apply the law of the land exclusively, to every issue placed before him for decision, without considering subjects or objects, or elements of locality.

The writings of Pütter and Pfeifer do not deserve our further attention ; both of them treated in a careless manner a topic that they neither understood nor sought to understand.

III. Even as late as 1894, a text-book upon German private law appeared, written by Franken, in which it is said that, in general, the principle of territoriality controls. In view of positive law as existing almost throughout the whole of Continental Europe, the statement will hardly be taken seriously.

5. The New Italian School

§ 38. Founding of the Doctrine of National Law.

Mancini, *Diritto internazionale* (Naples, 1873). This work contains the address of Mancini at the opening of the Academy of Turin in 1851: "*Della nazionalità come fondamento del diritto delle genti.*"

Id., *Revue de dr. i.*, vii, pp. 329, 348 et seq.: *Journal de dr. i.*, vi, p. 228.

Esperson, *Il principio di nazionalità applicato alle relazioni civili internazionali* (1868).

Id., *Journal de dr. i.*, vii, p. 329; viii, p. 206.

Lomonaco, *Trattato di diritto civile internazionale* (Naples, 1874), p. 42.

Pasquale Fiore, *Diritto int. privato* (Florence, 1869), § 23.

Catellani, *Il diritto internazionale*, iii, no. 877.

I. Mailher de Chassat ("*Traité des statuts ou droit int. privé*," 1845) had emphasized the fact that an alien sojourning in France should be treated as to many personal questions "in conformance with the laws of his country," *e.g.* in regard to his legitimacy or illegitimacy, as to adoption, and in fact generally as to his civil status. But his reasoning was fraught with irreconcilable contradictions unnoticed by him.

II. A new and deeper foundation for the application of the *lex patriæ* or *lex originis* in International Private Law was laid by Mancini and his disciples. According to their doctrines, native law should apply in international matters, when specifically native questions are being considered. This occurs in the law of the status, the family, and succession.

In the law of contracts, the intentions of the parties should govern, but if the contracting parties are both of the same nationality, the *lex patriæ* must apply here also.

The Italian School is based upon the view that very many laws are merely *coefficients of personality*, and as this is determined by *nationality*, their character should be considered national. Now as personality, thus typified by nationality, should also be respected abroad, a great complex of questions should be referred entirely to the *lex patriæ*.

The other category of laws embraces rules of public order; here of course the alien's right of personality must yield to the social welfare of the internal state; the provisions of law which accomplish this may properly be interpreted as territorial.

III. It is very significant that substantially all the principles of this school were adopted in the Italian Civil Code of 1865:

Arts. 6-12 contain the rules of International Private Law obtaining in Italy.

In Italy itself there are still a few opponents to the new theory, as, for instance, Fusinato in "*Archivio giurid.*," xxxiii, pp. 520-613, and Brusa in his notes to Casanova's "*Del diritto internazionale*," i, p. 301 *et seq.* : and ii, pp. 353, 363-366.

§ 39. Influence of the Italian School.

Laurent, i, No. 427.

L. Strisower, in *Österr. Gerichtshalle*, 1881, Nos. 21-26.

I. The Italian School entered upon a triumphant career.

1. Laurent supported the *lex patriæ* with great energy and said that he had reached the same result independently. He says (No. 427) :—

"If the laws of the status are personal, it is because they are the product of those thousand and one physical, intellectual, and moral circumstances which constitute nationality; they are personal because they are national; they ought consequently to follow a person everywhere because he carries his nationality with him; we may say of national laws all those things which the old jurists said of personal status; they are the marrow of our very bones, they circulate in our veins, since we receive our nationality with the blood which our parents transmit to us."

2. The German Imperial Court (ix, 408), long before the present Civil Code was enacted, said :—

"We notice a gradual gravitation toward a higher valuation of the significance of nationality as an ideal test."

3. The 18th Congress of the German Jurists passed the following resolution favoring the new doctrine :—

"In matters of conflict in International Private Law regarding capacity to have rights and capacity to act, legal relationships of the family and of succession, we take it to be the rule that the law of the domicile has been replaced by the law of the nationality." (See Jaques in *Revue de dr. i.*, xviii, p. 563.)

4. The *Institut de droit international* supported the doctrine at its session of 1874 held at Geneva.
5. The following proposed legislation also applies the new principle :—

(a) the code proposed for Belgium by Laurent (Meili, "*Kodifikation*," p. 19).

(b) the proposed treaty of Lima ("*Kodifikation*," p. 91).

6. The rule of nationality is supported by the latest German authorities (e.g. Regelsberger, "*Pandekten*," i, p. 167).
7. The new German Civil Code has adopted it.

II. The Italian doctrine, though well championed by its gifted supporters, found also sporadic opposition. The following objections were urged against its principle of nationality :—

1. law is not based essentially, or at least not entirely, upon national peculiarities ; indeed the origin of states develops many heterogeneous elements ; the law of one state has a considerable effect upon that of others ; many rules may be ascribed to accident or the humor of the legislature ; in many instances foreign law is simply copied ;
2. so far as there really are national peculiarities in the law, they do not exist to the same extent as they formerly did in the life of individuals ;
3. the importance of the element of nationality is not as great as the requirements of the society which surrounds the alien. In regard to territorial law applied by way of exception to the rule, it has been said that no proper test can be found whereby to determine when a regulation made by a state shall be considered as territorial.
4. It is claimed that the Italian doctrine mistakes the motives for giving particular effect to laws of a coercive nature and sets up wrong prerequisites for interpreting certain laws to be coercive.

Again, assuming that it is the probable will of the parties which determines the standard for the application of the law, it is likely that they would wish to invoke the law of their domicile to govern their respective obligations, if in fact they would wish to choose any law whatever.

XII. AT THE PRESENT TIME

§ 40. Brief Review.

Regelsberger, *Pandekten*, i, §§ 39-46.

Gierke, *Deutsches Privatrecht*, i, §§ 25 and 26.

v. Bar, i, pp. 100-119.

Zitelmann, *Internationales Privatrecht*, i-ii.

I. Modern Continental jurists bring the theory of the Italian School sharply into the foreground of their discussions. Opposition to the absolute sway of national private law has not entirely disappeared, however.

1. In addition to Fusinato, Brusa, and Strisower, already cited, we may also mention A. Chausse, who, in his article, "*Du rôle international du domicile*" (*Journal de dr. i.*, xxiv, pp. 5-31), draws attention to the high significance of domiciliary law.
2. I have repeatedly emphasized the fact that the present mad rush in favor of the application of the *lex patriæ* is based upon an exaggeration of the importance of the bond of nationality in modern affairs. I have enlarged upon this point in greater detail than is here possible in my pamphlet, "*Der erste europäische Staatenkongress über int. Pr.-R.*" (Vienna, 1894), p. 10; in my address, "*Der internationale Geist in der Jurisprudenz*" (Zurich, 1897), p. 27; in my article, "*Das Problem des int. Pr.-R.*," in *Österr. Centralblatt für die jur. Praxis*, xv, pp. 193-222; in my article, "*Über das histor. Debut der Doctrine des int. Pr.- und Straf-R.*," in *Böhm's Zeitschr.*, ix, pp. 11-13; and in my pamphlet, "*Das int. Pr.-R. und die Staatenkonferenzen im Haag*" (Zurich, 1900), p. 28. I also expressed this opinion at The Hague (see *Actes*, 1893, p. 69; *Actes*, 1894, p. 37; *Actes*, 1900, pp. 85-87).

II. The doctrines of Savigny have also been widely opposed.

1. Brinz (*Pandekten*, 2d ed., i, p. 23) states that the formula of this jurist fails to cut away from territoriality, and, in the form of an exception, reduces itself to the insecurity of the "Rule of Bartolus." Further, that it makes every law-book and statute in the world an appendix to the law of the land, or else it causes, in its conception of locality or "seat," an insoluble or arbitrarily soluble problem, because legal issues have no seat, or else sit upon two seats, as in contracts. As for the rest, Brinz believes that the key to the problem lies in the name that has been instinctively or briefly given to the law thus sought for, as for instance, by Puchta; for, indeed, International (Public) Law has furnished certain general rules and will continue to furnish them.
2. Dernburg ("*Preussisches Privatrecht*," i, § 26) calls Savigny's rule fickle and adds: "All attempts to solve these difficulties by one single abstract principle are doomed, from the start, to be in vain. The sure footing they pretend to give to practice is only ostensible."
3. Hartmann ("*Internationale Geldschulden*," p. 33) alludes to Savigny's formula upon the "seat" of obligations as a "widely diffused, dark, and mystic presentation of the subject."

III. Other systems have been devised. Reference may be made to:—

1. The plan of Pillet, "*Essai d'un system général de solution des conflicts des lois*," in *Journal de dr. i.*, xxi, pp. 417, 711; xxii, pp. 241, 500, 929; xxiii, p. 5. His clauses seem to me to lack penetration and to be unable to overcome the difficulties met with. Pillet really only formulates the problem anew, without furnishing any concrete solution.

2. The plan of Vareilles-Sommières in "*La synthèse du droit international privé*" (2 vols. 1897). This author favors a recurrence to the ancient statutory theory, the devotion to which, as displayed in this otherwise very readable book, is most astounding. The whole statutory theory, as we have seen, has gone through many phases and has been thoroughly revised at least three times. It is therefore necessary to point out just what statutory theory is to be adopted. It is precisely Vareilles-Sommières who so clearly shows that the threefold classification of the laws was intended to apply to provincial rules and not to the whole body of the law, as it does to-day. And yet this jurist declares that the same classification is applicable to modern legal conditions, and in the main exhaustive! He refers the whole topic to a few principles. See the recapitulation in vol. i, pp. 416 and 417, and vol. ii, pp. 184 and 185.

Vareilles-Sommières claims (i, pp. 8, 9, 78-97) that all opposition to the statutory theory is unfounded: "This theory is, in our opinion, learned and rational, profound and judicial. At most, one or two amendments are demanded to-day." It seems to me, however, that amendments might more profitably be made to the work of this author. It has been referred to criticisingly by Lainé in *Rev. critique de légis. et de jurisprud.*, xxiii. The essay of Lainé has also appeared separately under the title, "*Considération sur le droit int. pr. à propos d'un livre récent*" (Paris, 1900).

3. The plan of Zitelmann. This jurist seeks recurrence to International Public Law in addition to the rules of conflict set up within the states themselves. The rules of International Public Law limit internal legislation. The state can establish regulations only so far as its power reaches. Government is expressed in personal and territorial authority, the former being exercised over the subjects of the state, the latter within and over its territory, to movable and immovable things, incorporeal property and all tortious transactions. In the law of persons and domestic relations, contracts, torts, and wills and administration, Zitelmann, seemingly

without having it in mind, reaches the result of the Italian School. His conceptions are referred to by Marcusen, in *Zeitschrift für internat. Privat- und Strafrecht*, x, pp. 257-269, and Reuterskiöld in *Journal de dr. i.*, xxvi, pp. 462, 654. Compare also my remarks in *Zeitschrift für internat. Privat- und Strafrecht*, ix, p. 6, note 12, and v. Bar, in *Archiv für öffentliches Recht*, xv, pp. 1-49. Zitelmann suffers by reason of not having studied the earlier authorities; he also ignores the foreign literature of the subject.

The work of Zitelmann represents a sharp, logical composition, the result of deep contemplation; it is rich in ideas, it contains truly striking passages, and the study of the work is highly instructive. But the starting-point of his doctrines is, in my opinion, untenable, and the importance he gives to International Law is based upon a misconception of its purposes. Dernburg also expresses the thought ("*Das bürgerl. R. des deutschen Reiches u. Preussens*," i, p. 90, note 8) that ingenious as is Zitelmann's theory, it lacks reality.

G. Planck ("*Das bürgerliche Gesetzbuch*," v, p. 23) states that it is "quite doubtful" whether the tenor of the rules governing international intercourse can be derived from *existing* International Law, "no matter how interesting Zitelmann's reasoning may be, and no matter how desirable it were that International Public Law should furnish a sufficient basis for International Private Law."

4. The plan of Affolter. The question of the local application of the laws has been compared to that of their temporal application. This idea has lately been again taken up by Affolter ("*Das intertemporale Privatrecht; das Recht der zeitlich verschiedenen bürgerlichen Rechtsordnungen desselben Gebietes*," 1900). He places the two topics in parallel, in that they both represent a category of rules according to which the court, in the decision of civil cases, applies regulations at that moment invalid within its own jurisdiction. But he overlooks that the internal law frequently contains express rules of conflict by which reference is had, partly to foreign and partly to private law.

However, I would further wish to warn against this parallel, as the two questions are entirely different. This has been demonstrated by Göppert in his treatise upon the retroactive effect of the laws (*Jahrb. für Dogmatik, N. F.*, xxii, p. 69). The regulation of the effect of old as against new laws is entirely a matter of *internal* concern. Rules of conflict have a wider range in that they operate

for and against foreign citizens. The fact that in certain directions it may be said that the laws existing at the *time* and *place* of the making of a transaction apply, must not be too strongly relied on. The judicial and legislative views existing upon the two subjects are not identical. Furthermore, questions of local and temporal conflict may arise at one and the same time (cf. Habicht, "*Die Einwirkung des bürgerl. Gesetzbuches auf zuvoorentstandene Rechtsverhältnisse*," 3d ed., 1901, pp. 20, 23).

PART TWO

INTERNATIONAL CIVIL LAW

"The conflict of laws forms the second important and interesting branch of legal study. The mind becomes elevated and expanded by the contemplation of great principles broadly applied. Human nature, too, presents itself under its most inviting aspect. The very idea that a branch of law has sprung up, from sacrificing the strict and imperative right of sovereignty to the accommodation principle of national unity, is in itself a subject of the most gratifying reflection." — T. WALKER, "Introduction to American Law" (2d ed., Cincinnati, 1846), pp. 12-13.

GENERAL QUESTIONS

1. There are certain questions in International Private Law which may be of practical importance in almost every branch of the subject. Such, for example, are questions affecting the conceptions of domicile, nationality, fraud against the internal law, the formalities in which legal transactions are clothed, the limitation of actions. It is therefore to the purpose to deal first with these general questions under a separate division. In this way we avoid treating of them again later, when considering the detail, which would necessitate continual repetition. I will return to these general questions only when necessary to point out deviations from propositions here enunciated.

2. The scientific works which deal with these general questions, as well as with the detail, contain important discussions. I have not found it necessary, however, to cite the various authors specially under each heading. I have considered it wiser to mention monographs, although I refer consistently to the work of von Bar. It is particularly necessary to follow the authorities of all foreign countries. To limit attention to such works as describe only one system of law is wholly unsatisfactory.

§ 41. The Legal Position of Aliens in Modern Times in Respect of Private Law.

Störk, in v. Holtzendorff's *Handbuch des Völkerrechts*, ii, p. 592.

Bratier-Fodéré, iii, pp. 1235-1237.

Wess, *Traité théorique et pratique de dr. internat. privé*, ii: "*Le droit de l'étranger*" (1894).

Gianzana, *Lo staniero nel diritto civile italiano* (1879).

Our purpose here is to describe the general position of aliens before the law, without regard to the conflict of laws; for conflicts can arise only when aliens are accorded the same rights before the law as natives, whether it be in whole or in part.

I. *The modern law of civilized nations starts with the proposition that aliens are as equally entitled to the rights of private law as natives.*

1. Formerly the following distinction was made:—

Indigenæ = *membra regni, regni cives, nationales, patriæ filii* (citizens).
Forenses (foreigners or aliens).

Gluck, *Pandekten*, i, pp. 287-288, distinguishes:—

Subditi personales:—

(a) Citizens.

(b) Persons residing within the territory.

Subditi temporarii.

Subditi reales (simply landholders).

The distinction which the modern world makes is as follows:—

Citizens of the state.

Aliens (*forenses*) domiciled in the internal state.

Aliens simply sojourning transitorily in the internal state.

2. Citizenship arises:—

(a) *ex jure soli* or *loci*. Where this theory is adopted, all persons born within the territory are citizens "by right of the soil."

This construction is feudalistic. According to the French laws of 1874, 1882, and 1883, every person born in France, although of foreign parents, is a French citizen unless he takes advantage of the citizenship of his parents and renounces allegiance to France within a year after reaching majority. The Italian *Codice civile*, Art. 8, provides that the children of an alien born in Italy become Italian citizens, if the parent has resided uninterruptedly in Italy for ten years. The law of Italy, however, admits the right of adults to forswear in favor of other citizenship.

- (b) *ex jure sanguinis*. According to this theory, citizenship is dependent on relationship and descent.

The relation of the individual to the state, according to the modern conception, is regulated essentially by free will. For-swearing allegiance from one state to another is therefore permitted. This is now recognized by statute in England since 1870, and in the United States of America since 1868. Emigration was once prohibited in Prussia, but the federal law of 1870 applying to the whole of Germany has changed this.

The *Institut de droit international* has worked out a set of principles applicable to emigration. Compare : —

- (a) *Principes recommandés par l'Institut de droit international en vue d'un projet de convention et adoptés en séance du 1^{er} Sept., 1897 (Annuaire, 1897, xvi, pp. 262-264).*
- (b) *Vœux relatifs à la matière de l'émigration adoptés par l'Institut en séance du 1^{er} Sept., 1897 (Annuaire, 1897, xvi, pp. 276-279).*

3. The historical process was an endlessly long one, and there were many subjects in regard to which aliens had less rights in private law than natives. Instances of this kind to be found in history are, for example : —

- (a) the former position of aliens in most European countries in matters of succession (*droit d'aubaine*);
- (b) the right of deduction in succession;
- (c) the right of anticipation (*droit de prélèvement*).

4. Coming down to present times, the legislation and practice of the different countries of the world have adopted various points of view.

- (a) Some favor reciprocity. This is the principle adopted, *e.g.* in Art. 11 of the French *Code civil*, as follows : —
 “An alien shall enjoy in France the same civil rights as those granted to French persons, by the treaties of the nation to which such alien belongs.”

If there are no treaties, each case is examined for itself upon the question whether the alien has any claim to certain “*droits naturels*.” The principle of reciprocity is established in a similar manner by the Civil Code of Austria (§ 33), and it is also the rule in Norway and Sweden.

- (b) In many countries the right to acquire landed property is either denied absolutely or else made dependent upon governmental consent, *e.g.* : —
 - (aa) Roumania. Art. 7 of the Revised Constitution of 1879 provides as follows : —
 “Only Roumanians and naturalized Roumanians may acquire rural property.”
 - (bb) United States. Statutes discriminating against aliens are still to be found in the legislation of some of the States.
- (c) Some countries make practically no distinction in matters of private law between aliens and natives, *e.g.* : —
 - (aa) England. The only exception is with regard to the right to own ships.
 - (bb) Switzerland. This results from the practice of the federal courts (*A. E.*, vii, p. 515 ; ix, p. 12).

A formal equalization of the rights of aliens and natives has been accomplished by statute in : —

Italy, Art. 3, *Codice civile* : —

“The alien shall enjoy the civil rights accorded to citizens.”

Japan, Art. 2, Civil Code of July 16, 1898 : —

“Aliens shall enjoy the rights of private law excepting such rights as are refused to them by the laws and ordinances or by treaty.” (This latter limitation refers to the acquisition of landed property.)

The significance of these provisions lies in the fact that equality is not made dependent upon reciprocity or any other condition. This represents the modern tendency. It has been expressed also by the Institute of International Law (*Annuaire*, v, pp. 41, 56–57).

II. *A doctrinary equalization of natural persons, aliens with natives, in all questions of private law has been widely expressed and formally established by treaties.*

III. *The internal state may, however, protect itself against a violation of international private rights.*

Two methods present themselves for effectuating this purpose, *viz.* : —

1. Retortion (from *retorquere* = to return back, to reply) is the act of one state in returning an injustice of another in the same manner (*idem per idem*) ; *i.e.* an unjust discrimination by one state is practised also *against* it, by the other. Examples may be cited generally in disadvantageous treatment of aliens in private matters, such as by discriminating against them in bankruptcy.

2. Reprisals (from *reprendere* = to hold back ; Italian *represaglia*) are coercive measures by which one state seeks by force to compel the discontinuance of an injury or injustice exercised upon it by another. Such injury may consist in a delay or denial of justice. Examples may be cited in the refusal by a state to liquidate an obligation, or the taking of a ship belonging to another state. The claim of the latter is then followed up by other confiscations on its part.

The Introductory Law to the German Civil Code (Art. 31) provides as follows :—

“With the consent of the Federal Council, a right of retaliation may be established through a decree of the imperial chancellor, as against a state, its subjects and their assignees.”

In America and England

By the English common law, an alien was not permitted to purchase or inherit real property on office found ; but this and other disabilities were removed by 33 Vict. c. 14. The statute is declared, however, not to qualify an alien for any public office, or for any municipal, parliamentary, or other franchise ; nor can he be an owner or part owner of any British ship.

In America, a group of States have entirely removed the disabilities of aliens to acquire real property, among them being Massachusetts (Rev. St. 1873, c. 91) ; Ohio (Rev. St. 1880, § 4173) ; Wisconsin (Rev. St. § 2200). Another group has made the permanent holding of land by aliens dependent upon residence or a declaration of intended naturalization. To this group belong California (Code 1876, pp. 6, 404) ; Connecticut (St. 1866, p. 137) ; Indiana (Rev. of 1876, c. 11). New York has modified the common law rule (Laws 1875, c. 38) so as to permit aliens to succeed to lands which their ancestor acquired by purchase but not to lands acquired by descent (*Stewart v. Russell*, 1904, 86 N. Y. Supp. 625 ; *Callahan v. O'Brien*, 72 Hun 216). But no person shall be precluded from inheriting property by the alienism of his ancestor (4 Rev. St., 8th ed., p. 2466, § 22).

Some States have also adopted the principle of reciprocity. By chapter 593, Laws of 1897 of New York, “any citizen of a state or nation which by its laws *confers similar privileges on citizens of the United States*, may take, acquire, hold and convey lands or real

estate within this state in the same manner, and with like effect, if such person were, at the time, a citizen of the United States." *Fay v. Taylor*, 31 Misc. 32.

The general policy of these laws should not be referred to feudal traditions but to motives of an economic nature, viz. to prevent large blocks of land, especially tillable land, from falling into the hands of absentee owners. Thus in Pennsylvania a limitation of five thousand acres is set up, which, indeed, practically makes the restriction nominal.

The United States have entered into treaties with a number of countries giving their subjects a right to dispose of property within a reasonable time, if incapacitated by a State law from inheriting it. See summary of these treaties in Lawrence, "Comm. *sur* Wheaton," ii, 86. Such treaties become part of the local law of each State. *Hauerstein v. Lynham*, 100 U.S. 483; *In re Beck*, 11 N. Y. Supp. 199; *In re Fattosini's Estate*, 1900, 67 N. Y. Supp. 1119.

§ 42. The Nature and Classification of Rules of Conflict.

Kahn, in *Ihering's Jahrbücher N. F.*, xviii, pp. 1-106.

I. *By rules of conflict (Kollisionsnormen) are meant those provisions of private law which are established expressly for the purpose of removing conflicts between the laws or jurisdictions of different states.*

They may consist of provisions:—

1. upon the application of private law to aliens sojourning or domiciled in the internal state; or
2. upon the application of private law to natives of the internal state, sojourning or domiciled abroad.

The expression "rules of conflict" (*Kollisionsnormen*) is an abbreviated scientific term by means of which we denote those concrete provisions of private law, which point out what jurisdiction is competent, or what system of law authoritative, to judge international relationships between private persons.

There are, besides the express rules of conflict established by legislation, provisions applicable to international intercourse established by judicial practice, drawn from the purport and spirit of legislation or from the requirements of the world of commerce.

Rules of conflict are also to be found in treaties.

Positive law frequently leaves us in the lurch upon questions in practical life, in that it does not inform us whether the ordinary internal rules of private law refer also to native citizens living in foreign countries and to foreign citizens living in the internal state.

The precedent established by the Swiss law is remarkable. It correctly distinguishes the civil relations :—

1. of persons domiciled and sojourning in Switzerland. First title, Arts. 1-27. This is intercantonal private law ;
2. of the Swiss subject abroad. Second title, Arts. 28-31. This is one division of Swiss International Private Law ;
3. of aliens domiciled and sojourning in Switzerland. Third title, Arts. 32-34. This is the other division of International Private Law as prevailing in Switzerland.

II. *The leading paradigm of our topic is the existence of actual conflicts of laws ;* that is to say, examples of real divergences in the express rules existing in different states upon the application of private law.

A distinction is to be made between :—

1. *Positive conflicts.* These exist when conflicting rules of law of different countries struggle to control at the same time. On the question of capacity to act, it is possible that two differing laws may declare themselves applicable. This frequently occurs in matters of succession, but it also occurs in other divisions of the law. We have then a cumulation of laws from which the proper system is to be chosen.
2. *Negative conflicts.* These occur when no particular system of private law attempts to control. For instance, the state of the domicile declares the native state competent to issue a decree of guardianship ; the latter state, however, declares the former competent. The result may be that no guardian is appointed. Further, owing to certain conflicts, a child may be under no parental authority, and land be left without an heir. An example of the latter case is presented where an Englishman dies leaving immovables situated in Germany. English law applies only to immovables situated in England, and Germany refers the question of succession generally to national law.

III. *Even though there be an apparent similarity between laws, there may still be a conflict of interpretation.*

The applicability of a certain system of laws is, of course, dependent upon the "locality" of certain elements in the issue.

Elements which are of importance are, *e.g.*, citizenship, domicile, the movability or immovability of objects, the place of making or that of performing contracts. Again, in the individual cases, notwithstanding the identity in the name of a thing, differences may still arise from diverse conceptions of its nature: here we may speak of *latent* conflicts. Thus the French *Code civil* refers to a number of movables as being "immovables" (§§ 522, 524).

IV. *An interesting classification has been made of the rules of conflict contained in the Introductory Act of the new German Civil Code (A. Niedner, "Das Einführungsgesetz vom 18 August, 1896"). It is substantially as follows:—*

1. complete double provisions, *i.e.* those that regulate the application of local and foreign law at the same time, Arts. 7₁, 11₁, 17₁, and 21₁;
2. incomplete double provisions; *i.e.* those that regulate the application of local and foreign law, but only for such cases in which there exists a certain circumstance of connection with the internal state, Arts. 13, 15₂, 25. Herein are included rules of conflict relating to questions of domicile, the location of the property, the status of a party according to the internal law, etc.;
3. single provisions, *i.e.* those that regulate only the application of German laws, Arts. 14, 18, 19, 22.

These single provisions are again divided into:—

- (a) usual rules of conflict, *i.e.* those which adopt regular tests;
- (b) exceptional or singular rules of conflict, *i.e.* those that provide for an extended or limited application of either local or foreign laws, contrary to usual rules, as supplements to either single or double provisions, Arts. 7₂ and 8, 9, 10, 12, 13₂ and 14₂, 16, 17₂ and 22₂.

V. *Each state has an equal right to adopt rules of conflict of its own.*

No state issues rules binding on another, but it has the right to lay down objective propositions according to which aliens within its territory, as well as its own subjects in foreign states, shall be dealt with whenever jurisdiction over the parties or the subject-matter of an action is obtained. On principle, the systems of civil law throughout the world, with their rules of conflict, are to be taken as of equal value, with such exceptions as are presented by countries in which consular jurisdiction prevails.

VI. *Principles existing in a given state upon the retroactive effect of laws apply to all laws and include also the rules of International Private Law.*

Whether International Private Law is considered as being public law or as public and private law mixed, the result is the same. The usual principles will determine whether or not a retroactive effect may be given to a statutory rule of conflict. It is, for example, in this sense that Art. 1 of the German Introductory Law is to be taken, which provides that the rules of conflict contained in the act shall apply only to issues arising since January 1, 1900. The only exceptions are Arts. 30 and 31. Confer:—

Kahn, "*Das Zeitliche Anwendungsgebiet der örtlichen Kollisionsnormen*," in *Ihering's Jahrbücher*, xliii, pp. 299-434.

Diena, "*De la rétroactivité des dispositions législatives de droit international privé*," in *Journal de dr. i.*, xxvii, pp. 925-940.

§ 43. The Principle of Domiciliary Law.

Dicey, *The Law of Domicile as a Branch of the Law of England* (London, 1879); translated by Stocquart into French under the title: "*Le statut personnel anglais ou la loi du domicile*" (Paris, 1887-88; vol. ii contains important additions).

Lorimer, *Institutes of the Law of Nations*, i, pp. 436-437.

Westlake, pp. 284 *et seq.*

Asser-Cohn, pp. 24 *et seq.*

Bähr, "*Wohnsitz und Heimatsrecht*," *Ihering's Jahrbücher*, xxi, p. 343.

I. The law of the domicile in its applications to International Private Law signifies:—

that a certain group of legal questions in international matters is controlled by the law of that country in which the party permanently resides.

1. The fact that the law of the domicile was so often referred to in feudal times may be ascribed to the circumstance that the domicile largely determined nationality. This identification was not made by the Roman law, nor is it made in modern systems.

In the ancient state the identification of a person with a particular community found expression in citizenship. In this way a close connection arose with the *municipium* which extended the right.

Already at the time of Bartolus, the distinction between "*subditi cives*" and "*forenses*" or "*advenæ*" depended upon whether

the law of origin (*i.e.* of birthplace or parental domicile) or the law of the later actual domicile was considered authoritative.

The *Codex Juris Bavarici* (1753, chap. 1, § 3) declared that the *permanent residence* of the father is also to be considered as the domicile of his legitimate children (= *forum originis*). English authorities still speak of the "domicile of origin," which is the domicile by effect of birth, in contradistinction to that established by the choice of the party. Westlake says (§ 244), "To every person the law of England attributes at his birth a domicile, which is called that of origin, or the original or native domicile." The expression "*domicile d'origine*" recurs also in the law relating to diplomatic immunities, as adopted by the Institute of International Law in 1895 (*Annuaire*, 1895-96, p. 241, Art. 7).

2. The conception of domicile may vary, however, as the laws of a country usually set up standards for determining the domicile of a person differing with each class of rights dealt with. Thus the term "domicile" is used in the following connections:—

- (a) *in public law*; this is the domicile of politics and taxation. It is possible to have a political domicile not recognizable as to civil rights. Thus the German statute preventive of double taxation, of date May 13, 1870, provides:—

"A German has a domicile within the meaning of this act, at that place, at which he has a residence under such circumstances, that an intention to retain the same permanently may be deduced."

To the same effect is the wording of the treaty between Germany and Austria (1900) for the prevention of double taxation.

- (b) *in private law*; this is the civil domicile, or domicile strictly so called, and is the conception which alone interests us in this treatise.
- (c) *in procedure*; this is the forensic domicile and denotes that a party may sue or be sued at a certain place. Such a domicile may be founded upon a contract; the domicile of public or private law can never be. In other words, a forensic domicile does not necessarily presuppose residence at a particular place at all.

We must be careful not to confuse these conceptions; they are in no wise identical. It has been repeatedly held that the domicile of private law need not be identical with that of public law, especially with the domicile ascribed for purposes of taxation (*A. E.*,

xiii, p. 1356). Of course a domicile may, in fact, coincide in all its phases.

3. The conception of domicile in private law has been defined in the various countries, sometimes by legislation and sometimes by theory and practice. It presupposes a legal intention to reside permanently at a place (*animus manendi*) combined with the actual execution of that intention (*factum*).

(a) We find statutory definitions in the following countries:—

France, by Art. 102, *Code civil*:—

"The domicile of all French persons, so far as concerns the exercise of their civil rights, is at the place of their principal establishment."

Italy, by Art. 16, *Codice civile*:—

"The civil domicile of a person is at the principal seat of his affairs and interests. The residence is at the place at which a person has his principal abode."

Switzerland, by Art. 3, *N. & A.*:—

"The domicile of a person within the meaning of this act is at the place where a person resides with the intention of remaining permanently."

The *Corpus Juris* of Justinian contains a famous poetic passage in *L. 7, C. de incolis et ubi quis domicilium habere videtur*:—

"*Ubi quis larem, rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, unde cum profectus est peregrinari jam videtur, quo si rediit peregrinari jam destitit.*"

(b) Among the definitions furnished by the authorities, we may cite the following:—

Savigny ("System," viii, 58):—

"That place is to be regarded as a person's domicile which he has freely chosen for his permanent abode and thus for the centre at once of his legal relations and his business."

Story ("Conflict of Laws," § 41):—

"By the term 'domicile,' in its ordinary acceptance, is meant the place where a person lives or has his home. . . . In a strict and legal sense, that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning (*animus revertendi*)."

Wharton ("Conflict of Laws," § 21):—

"Domicile is a residence, acquired as a final abode. To constitute it there must be: (1) residence, actual or inchoate;

(2) the non-existence of any intention to make a domicile elsewhere."

The following will serve to illustrate the conception of domicile as worked out in concrete cases: —

- (a) The mere redepositing of passports from one place to another will not suffice to establish a new domicile (German Imp. Ct. xv, 368). Neither will the mere storing of household furniture at a certain place suffice. The Swiss practice is in accord (*A. E.*, xxvi, part 1, p. 124).
- (b) Formal declarations of an intention to change the domicile will not work such change unless actual residence at the new place follows (decision of German Sup. Ct. Comm., cited in *Journal*, ii, p. 369). There are some French decisions to the same effect cited there.
- (c) A domicile once established continues until a new one is acquired. This is a presumption that has been sanctioned by statute in certain states (*e.g.* Switzerland).

Dicey has two inferences on the point of domicile: —

"Rule 13. A person's presence in a country is presumptive evidence of domicile.

"Rule 14. When a person is known to have had a domicile in a given country he is presumed, in absence of proof of a change, to retain such domicile."

Art. 3 of *N. & A.* is to the same effect: —

"The domicile of a person, when once established, continues until a new one is acquired."

Each case must naturally be examined separately in order to determine whether the person *intended* to acquire a new domicile. Thus the weight of evidence would be strongly in favor of retaining the old domicile in a case in which a person had been detained at his European birthplace through illness, though in possession of a return ticket purchased before leaving his transoceanic (American) domicile (Swiss Federal Ct., *A. E.*, xxii, p. 986).

5. A domicile may be changed at will. Where a system of legislation supports the law of the domicile in solving a conflict of laws, the law of that place is meant at which the party had his domicile when the transaction was undertaken.

6. There are also domiciles by operation or presumption of law,

or of a particular statute, which continue as long as the requirements of the statute or the presumptions of law are satisfied, *e.g.* :—

- (a) The wife is domiciled legally at the domicile of the husband, though residing in fact at a different place. Exceptions to this rule are as follows :—
 - (aa) when the wife has been granted a separate domicile by the court ;
 - (bb) when the objective law provides an independent domicile for a *femme séparée* (French statute of February 6, 1893) ;
 (According to the rule prevailing in the United States, the wife may acquire a domicile separate from the husband's for the express purpose of a divorce, and then eventually acquire an independent naturalization.)
 - (cc) when husband and wife have separated by contract, provided such a contract be recognized by law ;
 - (dd) when, for certain reasons recognized by law, the wife cannot be expected to follow to the domicile of the husband (*e.g.* to exotic countries) ;
 - (ee) when the husband has no known residence ;
 - (ff) when the husband is known not to have any residence (*e.g.* a vagabond).
- (b) Children under parental authority have the same domicile as the person exercising such authority.

Cf. H. Taudière, *Traité de la puissance paternelle* (Paris, 1898), p. 344, who says briefly and to the point, "*L'enfant mineur n'est plus domicilié chez son père déchu.*"

- (c) Adult persons under guardianship are domiciled legally at the place of official control (Art. 4⁸, *N. & A.*).

7. A domicile in private law is *not* established :—

- (a) by maintenance at a place of correction or at a hospital ; it is otherwise where a person is under *permanent* support ;
- (b) by attendance at a place of learning, unless the course of study is exceptionally long, *e.g.* ten years, the limit set by Roman law (*L. 2 C. de incolis*, 10, 40).

8. The establishment of a domicile involves a legal transaction of public law. A lunatic is not in a position to acquire a new domicile, as he has no legal will. The mere fact of altering the place of residence is not sufficient to terminate an existing domicile and to found a new one (*A. E.*, xxii, p. 958).

9. Theoretically it is possible for a person to have no domicile

whatever. The case seldom occurs, but it *can* occur, and is mentioned by Ulpian in *L. 2, ad municipal.*, 50, viz. :—

. . . "*difficile est sine domicilio esse quemquam. Puto autem et hoc procedere posse, si quis domicilio relicto naviget vel iter faciat, quærens quo se conferat, atque ubi constituat; nam hunc puto sine domicilio esse.*"

To this category belong vagabonds (although of no great interest to private or public law), owners of circuses and menageries with their employees, and such actors as travel from place to place.

10. A certain peculiarity of Swiss law may be mentioned here. Art. 5 of the Federal Statute upon Political and Police Guaranties for the Benefit of the Confederation (*A. S.*, iii, p. 33) provides that the political and civil domiciles of members of the Federal Council and of the chancellor remain in those cantons in which they have the rights of citizenship. They remain under that jurisdiction and law so far as their rights as private persons are in question, except in regard to landed property and indirect taxation. By Art. 15 of the Federal Statute upon the Organization of Federal Offices, this provision is made applicable to members of the Federal Court and to chancery officers (*N. F.*, xiii, p. 455).

11. The mere *transitory* sojourn of an alien in the internal state, or of a local citizen in a foreign territory, does not involve subjection to the private law of that state—excepting under English law. English law still retains its feudal basis, and, accordingly, the mere sojourn of an alien in England subjects him, in most respects, to its laws. Foreign laws find application in England in comparatively few cases, because the theory prevails that as the state is sovereign also over aliens found within its territory, the application of the internal private law must follow as a necessary corollary.

A different rule prevails on the Continent of Europe, where local law is not applied to persons merely sojourning in the local territory, except such laws as are *coercive* in their nature.

II. *A whole group of countries have recognized by statute that the law of the domicile is authoritative in determining rights and obligations arising from the status of persons.* To this group belong :—

1. Denmark and Norway (Neumann, *Int. Pr. R.*, p. 37; and Lehr, *Éléments de droit scandinave* (1901), Nos. 23-30, pp. 18-20).

2. The Austrian Civil Code (in its application to aliens), § 34. The law of an alien's native state is applicable, however, in certain matters, under the condition of reciprocity.
3. Livonia, Esthonia, and Courland (Introduction to the Code of Private Law, iii, tit. xxviii).
4. Argentine (Civil Code, Arts. 6-7).

The proposed treaty of Montevideo was also framed on this basis (American Int. Conf., Reps. of Committees, etc., Washington, 1890).

III. According to the law of some countries a person may have more than one domicile. In these countries it is possible

that in certain matters, a transaction may be subjected to the law of either domicile, if both systems support the principle of domiciliary law, and no grounds exist for uniform application (e.g. in succession).

1. This was the view sustained by Ulpian in *L. 6, § 2, R. J. 50, 1*: "*Viris prudentibus placuit duobus locis posse aliquem habere domicilium, si utrobique ita se instruxit, ut non ideominus apud alteros se collocasse videatur.*" The German Civil Code, § 7, states that a person may have more than one domicile. Art. 3 of the Swiss statute is expressly to the contrary, as is also the law and practice in most other states (see Supplement, *infra*).

A double domicile has been construed to exist, for example:—

- (a) where a person lives at a foreign country place during the summer and at a home in town in the winter;
- (b) where a person conducts a hotel in one country in the summer, and in another country in the winter.

2. Where a person has more than one domicile, the law of that domicile is authoritative at which he actually resides in relation to each particular issue.

3. A multiple forensic domicile may be recognized under circumstances where a double domicile in private law would not be (*H. E., Zurich, xiv, p. 266*). The codes of civil procedure of many Swiss cantons recognize a multiple forensic domicile.

The legal effect of a multiple forensic domicile concerns International Civil Procedure and therefore will not be discussed at length here. In such cases the plaintiff may select the forum of any domicile, unless the issue is restricted to a particular forum (*e.g. the forum rei sitæ*) or to a special court (*e.g. a court of trade or industry*).

IV. *The following arguments may be advanced in favor of recognizing the domiciliary law as the standard:—*

1. The principle of domiciliary law is cosmopolitan in character in that it makes no distinction between native and foreign law. It offers protection to the alien simply because he is a member of society.
2. Under the principle of domiciliary law, the alien is placed upon equal footing with the native without any further discussion or inquiry.
3. The principle of domiciliary law, if universally adopted, would accomplish a clear situation everywhere. The domicile of a person can be deduced from external facts, and therefore may be generally known to every one. This is an element of great advantage to commercial intercourse.

On the other hand, the law of the domicile rests fundamentally upon the theory that an alien, taking up his residence in a foreign state, submits himself to its laws. This is a feudal conception of sovereignty. After clarifying and refining the idea of the state, a complete disregard of foreign law cannot be consistently supported, especially in certain directions where convincing grounds for its application are not difficult to find.

It is not altogether correct, either, to say that the domiciliary principle effects a "clear situation." Especially under modern conditions, it is often doubtful *where* a person is domiciled, while, on the other hand, a person's nationality is usually clearly established. An illustration is presented in the case of persons who systematically try to avoid taxation. It is also very difficult to determine, for instance, the question of the first matrimonial domicile (in regard to personal property), or the domicile of a testator (*e.g.* when death occurs while travelling, after having terminated his past domicile).

It is interesting to note that the Swiss Constitution of 1874 takes a definite attitude in regard to the two principles of domiciliary and national law.

Art. 46 says:—

"In matters of civil law, persons domiciled in Switzerland shall be, as a rule, subject to the law of their domicile.

"The federal legislature shall enact the necessary provisions for the application of this proposition."

The title of Federal Statute, *N. & A.*, proves it to be in execution of Arts. 46 and 47 of the Constitution.

V. The law of the domicile is applicable in all countries in the following special cases :—

1. Where a person has two nationalities.
2. Where a person has no nationality.

In both these cases it is impossible to apply the *lex patriæ*.

In America and England

The courts of the several States have shown a tendency to accept the definition of domicile given by Story, cited above: *Price v. Price*, 156 Pa. St. 617; *Hayes v. Hayes*, 74 Ill. 312; *Hairston v. Hairston*, 27 Miss. 704; *Tyler v. Murray*, 57 Md. 418; *Plant v. Harrison*, 36 Misc. (N.Y.) 649. In *Dupuy v. Wurtz*, 53 N.Y. 556, the court said :—

“To effect a change of domicile for the purpose of succession, there must be not only a change of residence, but an intention to abandon the former domicile and acquire another as the sole domicile. There must be both residence in the alleged adopted domicile and intention to adopt such place of residence as the sole domicile. Residence alone has no effect *per se*, though it may be most important as a ground from which to infer intention. Length of residence will not alone effect the change; intention alone will not do it; but the two taken together constitute a change of domicile.”

In America a domicile once acquired continues not only until it is abandoned, but till another is acquired (“*Jacobs on Domicile*,” § 114). In this respect it differs from the rule in England, where the domicile of origin reverts at once upon the abandonment of the domicile of choice (*Udny v. Udny*, L.R. 1 H. L. Sc. 441). Both rules, however, lead to the result that no one can be without a domicile. In other words, even though a person be in fact homeless, a home will be ascribed to him by way of presumption or fiction of law, for the purpose of determining his legal rights (*Dupuy v. Wurtz*, *supra*; *Hindman’s Appeal*, 85 Pa. St. 466; *Abington v. N. Bridgewater*, 23 Pick. 177).

Both jurisdictions agree in declining to follow the rule existing in some of the Continental countries, that a person may have more than one domicile for the same purpose at the same time (*Dicey*, p. 95; *Desmare v. United States*, 93 U.S. 605). This results from the distinction made between “domicile” on the one hand, and

"home" or "residence" on the other, "A person may be domiciled in one state and resident of another (*Frost v. Bisbin*, 19 Wend. 11). His domicile is the place to which he intends eventually to return, and there to remain (*In re Thompson*, 1 Wend. 43), while his residence comprehends no more than a fixed abode for the time being, as contradistinguished from a place of temporary sojourn (*In re Wrigley*, 8 Wend. 134)" (*Eaves Costume Co. v. Pratt*, 22 N.Y. Supp. 74). A person may therefore have two homes, or be entirely homeless, but he can never have more than one domicile, or be in want of one (*Desmare v. United States*, 93 U.S. 605).

In respect to the domicile of persons under disabilities, such as minority, marriage, insanity, etc., the practice is the same as the Continental rule. England, however, holds closer to the principle that the wife's domicile follows that of the husband. Thus, even though the wife lives apart from the husband, either by agreement or through abandonment, a separate domicile will not be ascribed to her (*Dolphin v. Robins*, 7 H. L. C. 390, 420; *Le Mesurier v. Le Mesurier*, 1895, A. C. 517). The rule is the contrary in America (*White v. White*, 1893, 18 R.I. 292; *Greene v. Windham*, 13 Me. 225). A divorce granted to the wife in one State on the basis of a domicile acquired by the wife, after cause for divorce by the husband's conduct, must be recognized in every other State (*Atherton v. Atherton*, 1900, 21 U.S. Sup. Ct. Rep. 544). In Massachusetts, the wife is permitted an election between the husband's domicile at the time cause for divorce arose and his later domicile (*Sewall v. Sewall*, 122 Mass. 156). Other States do not permit of this election, but allow the wife to retain the domicile had by the husband when the cause for divorce arose, without reference to the husband's change of domicile (*Colvin v. Reed*, 55 Pa. 375). In one State, Vermont, a wife is allowed a separate domicile, even though not for the purpose of securing a divorce. The right to acquire a separate domicile for the purpose of divorce is sometimes expressly declared by statute (see § 1768, N.Y. Code of Civ. Proc.).

A guardian has been held not to have the power of removing the domicile of the ward outside of the country in which he was appointed (*Douglas v. Douglas*, L. R. 12 Eq. 617, 625; *Lamar v. Micou*, 112 U.S. 452). But if the ward resides with the guardian as a member of his household, and actually removes with him to his new abode, his domicile has been held to change with that of

the guardian (*White v. Howard*, 52 Barb. N.Y. 294; *contra*, *Daniel v. Hill*, 52 Ala. 430).

§ 44. The Principle of National Law.

O. Bähr, cited at head of § 43, *supra*.

Meyer von Schauensee, cited at head of § 43, *supra*.

A. Geouffre de Lapradelle, *De la nationalité d'origine, droit comparé, droit interne, droit international* (Paris, 1893).

Cogordan, *La nationalité au point de vue des rapports internationaux* (2d ed., Paris, 1890).

I. National law in its application to International Private Law signifies:—

that a certain group of legal questions in international matters is governed by the law of the state of which the parties are citizens.

1. The national law is that which prevails in the nation to which a person owes allegiance by the rules of public law.

The conceptions of native law (*lex originis*) and national law (*lex patriæ*) do not always coincide, as variances may exist within one and the same nation. This is the case, *e.g.*, in Spain, in Greece with relation to the Ionian Islands, and in many confederated states where sovereignty has been merged. The two terms are often interchanged in practice; no ambiguity need result, however, as it is manifest that, in case of doubt, the *lex originis* is intended.

2. This idea is plainly expressed in the Japanese Statute of 1898 (*Ho-rei*), which provides (Art. 27):—

“If a person belong to a state, the law of which varies locally, the law of the locality to which he belongs shall be authoritative.”

3. The acquisition of nationality involves an act of public law. The courts, therefore, cannot inquire collaterally into the regularity of naturalization. It is a matter which is considered, on the Continent of Europe, as concerning the administrative branch of the government (Blumer-Morel, *Bundesstaatsrecht*, 3d ed., i, pp. 342, 344; *A. E.*, viii, p. 824).

Art. 10 of the German Statute upon the Acquisition and Loss of Federal and State Citizenship provides that the certificate of naturalization establishes the rights and duties of citizenship from the moment of delivery. It may be revoked, however, particularly when obtained by fraud (Cahn, “*Das Reichsgesetz über die Erwerbung und Verlust der Reichs und Staatsangehörigkeit*,” 2d ed., pp. 83–84, 486–487). The authorization which the Swiss Federal Coun-

cil issues differs from the German method of procedure, in that it is only the first legal step leading to the acquisition of citizenship. It becomes effective only when municipal and cantonal citizenship has been acquired (Art. 4, Federal Statute upon the Acquisition and Renunciation of Citizenship).

Although a state has no power to annul a foreign act of naturalization, the courts may ignore its legal effect, in determining private rights, where it has been obtained by fraud, or for an ulterior purpose (v. Bar, I, pp. 216-222).

4. As the national law is frequently the standard for determining civil rights, the courts are compelled to decide the nationality of the parties collaterally. But, as we have stated, they have no power to go behind acts of the administrative authorities.

II. *A person may possess nationality in more than one state at the same time.*

1. As a matter of history, it is interesting to note that multiple rights of citizenship were recognized in Greece (A. Hug, "*Studien aus dem klassischen Altertum*," 1886, i, pp. 1 *et seq.*), but not in Rome (Cicero's oration for L. Cornelio Balbo, xi, No. 28; xiii, No. 31).

Multiple nationality is a conception highly objectionable *in theory*. Cogordan says (*La nationalité au point de vue des rapports internationaux*, 2d ed., p. 15): "The idea itself of a native land, which presupposes fidelity and attachment, is incompatible with the coexistence of several nationalities in the same individual. In practice, however, positive conflicts of nationality, where two countries claim the same individual as citizen, are a frequent cause of difficulty between states."

Multiple nationalities occur *in practice* under the following circumstances:—

- (a) where a person at birth satisfies the requirements of several states for the acquisition of citizenship;
- (b) where a person acquires new citizenship in one country without losing the old at the same time.

The nations have set up various systems for determining nationality, viz.:—

- (a) That the place of birth is of no significance in determining nationality; the nationality of descent is retained. This is the basis of the German statute, § 3, and of the Austrian Civil Code, § 28.

- (b) That the place of birth establishes nationality, with the proviso that within a year after maturity the person may choose the nationality of his descent. This is the system followed in France by the law of 1893, and also in Italy (Art. 8, *Cod. civ.*).
- (c) That the place of birth establishes nationality. This is the system of the United States of America, with certain exceptions in favor of children born of American citizens abroad.

2. In the Swiss Statute, *N. & A.*, double nationality is recognized by Art. 5; no such prohibition as in the case of double domicile exists. (See also *A. E.*, xii, p. 512; xv, p. 343; xxi, pp. 9-10; Blumer-Morel, *supra*, i, p. 336.)

In Art. 5, above quoted, two cases are cited:—

- (a) where a person has rights of citizenship in more than one canton but has had a domicile in only one of them, this will be the canton of origin; if he has lived successively in several, that of his last domicile is controlling.
- (b) if he has been domiciled in none of them, the one where he last acquired citizenship is controlling.

This is also applicable *internationally*, by analogy. Compare also Art. 27 of the Japanese law (translated *infra*).

Expatriation is permitted under Swiss law only where a release from the bond of citizenship has been granted by the state. It therefore occurs that persons who have become American citizens are, in Switzerland, held still to retain their Swiss citizenship. (*A. E.*, xxiv, part 1, p. 316.) Of course, according to the practice of American officials, this right of citizenship becomes lost where no notice has been given of any intention to return. On the other hand, the Swiss point of view is that citizenship is not lost except with the assent of cantonal officials, even though its renunciation has been followed up by the acquisition of a new citizenship in a foreign country (*A. E.*, xv, p. 343).

3. Japan holds to the same principle.

The Japanese Statute of 1898 (*Ho-rei*) upon the Application of the Laws provides (Art. 27):—

“In case the law of the nationality is authoritative and the person in question is possessed of more than one nationality, the law of that state will be applicable wherein the person last acquired citizenship; should one of the nationalities be Japanese, however, the latter shall be authoritative.”

III. *There are many systems of legislation which support the principle of national law:—*

1. Italy. The *Disposizioni* have followed it far-reachingly and in detail (Arts. 6, 7, 8, 9) ;
2. France (*Code civil*, Art. 3), as well as the practice of the courts ;
3. The Netherlands (Special Stat., Art. 6) ;
4. Sweden (Neumann, p. 37 ; Lehr, *Éléments de droit civil scandinave*, Nos. 23-30. Also *Zeitschrift für internat. Privat-und Strafrecht*, i, p. 227, note 2) ;
5. Russian Poland (Neumann, *supra*, re Poland, *Journal de dr. i.*, i, 48) ;
6. Spain (Civil Code, Art. 9) ;
7. Portugal (Civil Code, Arts. 24 and 27) ;
8. The German Empire (Art. 7 etc., Introd. Law to Civ. Code) ;
9. Greece (Law of 1856, Art. 4, and *Journal de dr. i.*, xxi, p. 592) ;
10. Roumania (Civil Code, Art. 2) ;
11. Mexico (Civil Code, Arts. 10-19) ;
12. Montenegro (Property Code of 1888, Arts. 1-9, and 786-800) ;
13. Japan (Special law of 1898, Arts. 3 *et seq.*) ;
14. Venezuela (Civil Code, Art. 7) ;
15. The Congo (Law of 1891, § 2).

Upon this basis are also the proposed treaty of Lima (Art. 6), and Laurent's draft for a new Belgian code (Arts. 11-12).

IV. *The Swiss law stands on intermediate ground.* In certain matters the *lex* and *forum originis* apply in intercantonal matters, and, by way of analogy, also internationally; *e.g.* Arts. 8 and 9, *N. & A.*

An interesting passage in Savigny ("*System*," viii, p. 94) comments how rigidly Switzerland has kept to the national principle. This great jurist considered it as something "remarkable" that in such a small European country a similar legal situation had developed as he had shown to exist in Rome, *i.e.* an *origo* separate from the *domicilium* and with authoritative importance placed on the former.

O. Bähr, in his treatise cited at the head of § 43, *supra*, states that this fact, seemingly so "remarkable" to the great jurist, is easily explained. Bähr claims it to be nothing more than in execution of principles resulting from a completely developed state and municipal citizenship. And Bähr adds that Savigny's reasoning is proof of how so eminent a genius becomes sometimes so involved

in classical studies as to lose the significance of the modern development of law (p. 376).

V. *The following arguments may be advanced in favor of recognizing national law as the standard of private rights.*

1. It is in keeping with the close relationship of the individual with his native state. It effectuates more completely than any other system the idea of national unity, which is the basis of the modern state. There is also an ethical foundation for the principle, as the alien should not be subjected to rules which are strange to him and utterly out of harmony with his national and personal characteristics. It is true that too great an accentuation of the idea of nationality in civil law would make international intercourse more difficult and might even threaten a return to the conditions which prevailed under race law. But there are certain relationships which should be dealt with uniformly and which should not be made to change with the domicile or sojourn of the party. These standards are variable, whereas that of nationality is permanent.

2. Generally speaking, the domicile is the radiating point of *economic* life only. Domiciliary law should therefore be restricted to commercial relationships. Questions of *personal* law, such as capacity to act, marriage, parental authority, should be so regulated as not to be subject to every change of locality.

VI. *The national law is the authoritative standard for determining the rights of aliens in territories under consular jurisdiction.*

1. Art. 4 of the Egyptian Civil Code (see § 9, *supra*), though it serves as an illustration, is not correctly expressed. It refers the questions which it mentions to the "personal status." This term may be here understood as designating the *lex patriæ* or national law, although, as we shall see, the conceptions are not identical (see § 47, I *infra*).

2. Aliens of Christian countries living in Turkey, China, Siam, and Persia are, in general, subject to national law.

VII. *The law of the domicile is applied to the relations of persons without nationality.*

Legally homeless persons are not infrequently found in modern life. To illustrate: Where a German deserter marries a Swiss woman (in England) and then takes domicile in Switzerland, the wife and children are of no nationality. Germany does not recognize the marriage of a deserter, while Switzerland gives to it the usual effect of expatriating the wife.

1. The German Introductory Act, Art. 29, contains the following provision upon this topic :—

“Where the national law is declared authoritative in determining the rights of a person, and the person is found to belong to no state, the law of the state to which the person last belonged shall apply. If the person never belonged to any state, the laws of the state in which he is domiciled or in the absence of domicile, in which he sojourns, or was sojourning at the authoritative time, shall apply.”

An illustration of want of nationality is presented where a renunciation of citizenship has been made in one state, without acquiring it in another ; also where, in contravention of a statute, a person has failed to protect his right of citizenship by consular matriculation during a period of sojourn in a foreign land (see Note 7, *infra*).

2. Art. 27 of the Japanese law (*Ho-rei*) provides :—

“For persons without nationality, the law of the domicile serves in place of national law, or if no domicile is known, the law of the place of sojourn.”

3. Art. 800 of the Property Code of Montenegro provides :—

“Whenever citizenship determines the application of the laws to a legal transaction, and the person in question has lost his former citizenship without acquiring a new one, the law of the state of which he was formerly a citizen shall apply, until a new citizenship be acquired.”

In America and England

Nationality may be acquired as a result of the following circumstances, viz., by birth, by descent, by marriage, or by naturalization.

By birth. At common law any person born within the kingdom became a natural-born subject thereof, provided his parents were not at the time public enemies (Calvin's Case, 1608, 7 Rep. 18 a). This rule remains in force to this day in England. It has been reaffirmed in a different form in the fourteenth amendment of the Constitution of the United States, which provides that “all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.” This provision has been applied to native-born Chinese, although their parents are expressly excluded by

statute from naturalization (*In re Look Tin Sing*, 21 Fed. Rep. 905; *In re Wong Kim Ark*, 71 Fed. Rep. 382).

By descent. By § 1993 of the Revised Statutes of the United States, all children born abroad whose fathers were citizens of the United States at the time of their birth are declared citizens; provided that "citizenship shall not descend to children whose fathers never resided in the United States." The same rights are extended in England to children born in foreign countries, except that the statutes require that the father shall be a *natural-born* citizen, and that either the father or the father's father shall have been born within British dominions (Westlake, 3d ed., pp. 324-326; Dicey, Rule 23). In neither jurisdiction can nationality be inherited through women.

In both jurisdictions a system is recognized by which nationality is acquired by the combined effect of descent and residence. By the United States Revised Statutes, § 2172, "the children of persons who have been duly naturalized under any law of the United States . . . being under the age of 21 years at the time of naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof" (2 Wharton's Int. Law Dig., § 184). Practically the same rule obtains in England under the Naturalization Act of 1895 (58 and 59 Vict. c. 43), the terms of which, however, are somewhat broader. Residence at any time "during infancy," whether before or after naturalization, will suffice. There seems to be still some doubt as to the effect of the American statute on this point (*Heisinger's Case*, For. Rel. U.S. 1890, p. 301).

By marriage. Marriage in no case affects the nationality of the man, but with the woman it has all the judicial effects of naturalization (U.S. Rev. St. § 1994; English Naturalization Act of 1870, § 10). In England, the rule works both for and against British nationality, as the statute says that "a married woman shall be deemed to be a subject of the state of which her husband is, for the time being, a subject"; but in America it has been held that a native woman who marries an alien in the United States and lives there with him to the time of his death does not become an alien (*Comitis v. Parkerson*, 56 Fed. Rep. 556).

By naturalization. In the United States, the right of naturalization is extended "to aliens being free white persons and to aliens

of African nativity and to persons of African descent" (Rev. St. § 2169). Under this rule, as was well said by a New York judge, "a Congo negro but five years removed from barbarism can become a citizen of the United States, but his more intelligent fellow-men, native born American Indians and of the yellow races other than the Chinese, are denied the privilege" (Danaher J. in *In re Po*, 7 Misc. Rep. 471). Thus the right of naturalization has been refused to natives of Japan (*In re Yamashita*, 1902, 30 Wash. 234) and to those of the Hawaiian Islands (*In re Kanaka Nian*, 1889, 21 Pac. 993).

Citizenship of the United States is separate from citizenship of a State, and the latter does not confer the rights of the former (*Boyd v. Thayer*, 143 U.S. 135). This is important because most of the States have enacted statutes conferring State citizenship upon non-naturalized foreigners intending to become citizens of the United States (see summary in 15 Alb. L. J. 485). Conversely, a person may become a citizen of the United States without acquiring citizenship within a particular State, as, for instance, in the case of annexation (*U.S. v. Cruikshank*, 92 U.S. 542; *Com. v. Clary*, 8 Mass. 72). Thus, the annexation of New Mexico caused this effect (*De Baca v. U.S.*, 1901, 36 Ct. of Claims 407), but natives of the islands annexed to the United States as a result of the late war with Spain did not become citizens of the United States by virtue of the treaty of Paris (*In re Gonzalez*, 1902, 118 Fed. Rep. 941).

An alien, if under no disability, can become a naturalized British subject by compliance with the conditions prescribed by the Naturalization Act of 1870, § 7.

Similar to the Continental rule as stated above, a decree or order of naturalization will not be impeached collaterally by the court (*State v. Macdonald*, 24 Minn. 48). But the government may invalidate it if obtained by fraud (2 Wharton's Int. Law Dig. § 174, *a*).

The right of expatriation, though not recognized at common law, is now accorded in both Jurisdictions (Eng. Nat. Act, 1870, § 6; 15 U.S. St. at Large, 223). The latter act declares it "a natural and inherent right of all people." The history of this provision is recounted in an interesting article by Bassett-Moore (*Harper's Magazine*, January, 1905). Differing from the rule prevailing in some countries of Europe, however, neither British nor

American nationality is lost, except by the acquisition of nationality in some other country (Eng. Nat. Act, 1870, § 6; *Browne v. Dexter*, 66 Cal. 39; *Comitis v. Parkerson*, 56 Fed. Rep. 556).

As the law of nationality plays practically no rôle in determining the application of private law in America or in England, it seldom becomes important in private law to inquire of what nationality an alien is possessed. The primary distinction is simply between native subjects and aliens. All those who are not native subjects are aliens (see Dicey, Rule 21, p. 174). The question, therefore, as to whether there are persons without any nationality is not a practical one in these Jurisdictions, though the instances cited by the author would no doubt be recognized as proper cases of this kind by the executive branch of the government, just as, in fact, cases of *double* nationality have been so recognized (U.S. Foreign Rel. 1873, vol. iii, 15; *In re Steinkauler's Case*, 12 Alb. L. J. 23; Lawrence Com. *sur* Wheaton, iii, 208, as to England).

The system of law applicable to the legal relationships of American citizens in foreign countries, where the principle of national law controls, is that of the State of domicile. It is true, the federal state alone has the power of conferring *political* status, but the private or *civil* status of a person is determined by the particular State to which he is subject, *i.e.*, wherein he is domiciled (see *In re Hall*, 1901, 61 App. Div. 266, N.Y.). This results not only from our own jurisprudence but also from the doctrines recognized abroad as stated by the author (*supra* I, 1 and 2), that it is the law of "origin," or, in other words, of the smaller political unit to which the subject more intimately "belongs" which controls, in case the "national" law does not represent a uniform system. It is well to remember in this connection that, by the fourteenth amendment to the Constitution, domicile implies citizenship in the State of domicile.

NOTES

1. The Institute of International Law has adopted a set of resolutions upon the conflict of laws relating to nationality (*Annuaire*, xv, 1896, pp. 270-271).

2. Art. 13 of the French Civil Code, as amended by the Law of 1896, provides: "An alien who has been authorized by decree to establish his domicile in France shall have the enjoyment of all civil rights. The effect of the authorization shall cease at the expiration of five years, if the alien does not ask to be

naturalized, or if his application is rejected. In case of decease before naturalization, the authorization and the time of residence following it shall count for the wife and the children who were minors at the time of the decree granting such authorization."

3. Cf. Weiss, "*L'admission à domicile des étrangers en France et la loi du 26 juin 1889 sur la nationalité*," *Jour. de dr. i.*, xxvi, p. 5.

4. A publication has been issued (Berlin, 1898) by order of the police officials of Hamburg, containing the laws of all the European nations upon the acquisition and loss of citizenship.

Cf. W. Cahn, "*Das Reichsgesetz über die Erwerbung und Verlust der Reichs- und Staatsangehörigkeit vom 1. Juni 1870*," 2d ed., 1896.

5. Certain difficulties are found in determining the system of law applicable to citizens of Bosnia and Herzegovina, as these provinces still belong formally to Turkey. Compare Jivöin Péritsch, in *Rev. de dr. i.*, N. S., iii, pp. 50, 241, 398.

6. Modern law recognizes other instances of denationalization ("*Heimatlosigkeit*," "*le heimatlosat*") besides those mentioned in l. 17, § 1, *le poenis* 48, 19, "*Idem quidam æroïdes sunt, hoc est: sine civitate, ut sunt in opus publicum perpetuo dati, et in insulam deportati, ut ea quidem, quae juris civilis sunt, non habeant, quae vero juris gentium sunt, habeant.*"

7. The German law of 1870, § 21, provides that Germans who remain without the territory of the Empire for a space of ten years uninterruptedly, lose thereby their right of citizenship. The running of the statute may be broken by matriculation at the office of a German consulate.

Russian citizenship is also lost without further ceremony if a person remains abroad uninterruptedly for ten years without renewing his pass; in all other events, a governmental authorization is required to effect expatriation (*Jour. de dr. i.*, xxvi, pp. 870-871). Compare particularly also Beauchet, "*Sur les sujets russes naturalisés américains dans leurs rapports avec la mère patrie*," in *Jour. de dr. i.*, xi, pp. 247-250.

8. The German Statute upon Consular Jurisdiction of April 7, 1900, is reprinted in *Z. für Handelsrecht*, N. F., 35, p. 197.

9. The Swiss law of naturalization of 1876 (*N. F.*, ii, p. 510) provides (Art. 5) that Swiss citizens also possessing citizenship in another state have no claim to the rights and protection of Swiss citizenship as long as they reside in such other state.

A person born of Swiss parents in France, though not declaring his option to remain Swiss, does not therefore lose his Swiss citizenship; this is a case of double nationality (*A. E.*, xxi, pp. 9, 10).

§ 45. Neutral Principles.

Meili, "*Das Problem des internationalen Privatrechts*," in *Österreichischen Centralblatt für die juristische Praxis*, xv, pp. 193-222.

Id., "*Über das historische Debut der Doctrin des internationalen Privat- und Strafrechts*," in *Zeitschrift für internat. Privat- und Strafrecht*, ix, pp. 11-13.
Id., *Das internationale Privatrecht und die Staatenkonferenzen im Haag* (1900), pp. 26-32.

I. The opinion, though widespread, is to my opinion entirely incorrect, that the conflict of laws can only be properly regulated

through the acceptance of either the domiciliary or the national principle for application throughout the whole range of International Private Law. A reconciliation should be accomplished between the two principles in certain directions. Stated more definitely :—

We should demarcate those elements, on the one hand, which permit the lawmaker to give effect to the law of the domicile or sojourn, and, on the other hand, those which influence him to promote and effectuate the continuance of that public bond which connects the individual with his native state.

The scientific task of International Private Law is not to fix juristic landmarks over the field of private law by the acceptance of *general* rules, but rather to make possible the finding of concrete solutions for the *particular* conflicts which arise. In accomplishing this task, we ought to be able in an unconstrained manner, to succeed in discovering solutions which will represent a *sententia media*.

1. It really cannot be denied that the unlimited accentuation of *domiciliary* law is not satisfactory to ideas of complete justice. [Among English jurists we find Dicey, who, though making the doctrine of domicile his special study, maintains that the principle of nationality is the sound principle for future legislation ("On Domicile," p. 362). Sir W. Phillimore has recently expressed views in favor of the principle as to all matters of personal law. Report of 20th Conference of the International Law Association, p. 230. — *Trans.*] In this connection I again have in mind questions such as those of status, divorce, succession. It is striking to think that to-day, when domicile can be so easily changed, the system of private law applicable to the rights of a person is often made to depend upon the fact of domicile alone. It thus results that such rights can be placed upon an entirely different basis from day to day. The possibility of making this complete change could very wisely be limited by an international understanding upon the conception of domicile. A rule might, for instance, be established that, for the purposes of determining the application of the laws, a new domicile shall be considered as acquired only when it has continued within a state for as long as is necessary for the acquisition of citizenship.

2. The one-sided accentuation of the importance of *national*

law is no more satisfactory than the complete reliance upon the domiciliary principle. It would certainly be unfavorable to the course of trade if, at every step taken within the local state, individuals presented themselves who were not subject to local law. The result would be especially undesirable in a state in which there were many aliens. Under such a system we might almost say that the unity of the law ceased where it began—a consequence most disastrous to the regular administration of the law.

Unfortunately the formula of *lex patriæ* exercises upon many jurists an almost hypnotic influence. They expect miracles from it and at all times the correct solutions. But international problems cannot be controlled and regulated in the manner of an automaton, by the touching of a spring.

Under these circumstances we should not easily resign the thought of effectuating a compromise. It cannot be said that the two principles are in their nature irreconcilable; they would not represent a mixture of fire and water. Furthermore, the principles of International Private Law are no more completely controlled by pure logic than are those of the internal law itself.

II. *The attempt to reconcile the two principles of domiciliary and national law has been made by the Swiss Federal Statute, N. & A.*

This it has done particularly with regard to:—

1. guardianship, Arts. 14 and 33 (see *infra*, § 83);
2. succession, Art. 22, (see *infra*, § 134).

III. *Methods of arriving at a neutral standard.*

1. A reconciliation might be attained between the two opposing principles, by providing a term after which aliens domiciled in the internal state shall be subject to domiciliary law. This solution would be like the provision often found in the laws of mediæval Italy, viz. that a ten years' residence effectuates citizenship. Of course I would not wish to go to that extent, but an assimilation of the private law of a state to persons living within it for many years, is by all means required. We might therefore establish the rule that a person domiciled, say for ten years, shall be subject to domiciliary law, unless he has, in solemn manner, declared his express desire to be subject to his national law.

2. Another plan is much more acceptable to me than the first.

It consists in respecting a part of the national and a part of the domiciliary law. There are a mass of persons whose economical and legal relations are permanently wrapped up with foreign countries, and who yet do not wish to break the ethical bonds that connect them with their national state. In these cases it seems inappropriate to apply exclusively the national law.

3. The neutral doctrine initiated by Swiss law should be carried out to its logical conclusions. This is easily possible in the following directions, viz. :—

- (a) in the law of persons concerning the status ;
- (b) in the law of the family concerning :—
 - (aa) marital property ;
 - (bb) divorce ;
 - (cc) guardianship ;
- (c) in the law of succession.

IV. *A neutral standard has lately been developed which provides that, in certain branches of the law, a right shall not be recognized unless the provisions of two systems unite in recognizing it.*

This conception has been applied concretely as follows :—

1. by granting divorces to aliens only when there are grounds recognized both by the national and the local law (Hague treaty on divorce, Art. 1 ; see Appendix II) ;
2. by making the heir liable for an obligation of the deceased, only in case the law of the place where the obligation has its seat and that of the state administering the inheritance are in accord upon this point (see v. Bar, "*Lehrbuch*," p. 121) ;
3. by recognizing liability for tort only in case it be recognized both by the law of the place wherein the tortious act occurred and by the local law (see § 128, *infra*).

If we should agree with the view that international relationships in these three directions shall be subject to more than one system of law, there is no reason why contemporaneous reference to more than one system should not be made in other matters as well.

NOTES

1. As a delegate of Switzerland to the Hague International Conferences I frequently seized the opportunity of favoring, as well as demonstrating, the practical possibility of reconciling the *lex patriæ* and the *lex domicilii*. Cf. *Actes*, 1893, p. 69 ; 1894, p. 37 ; 1900, p. 85. I insisted upon it particularly in

the law of succession (*Actes*, 1900, pp. 107, 108, 111, 112). I have also repeatedly tried to develop the idea in scientific treatises and I called attention to it in my address before the American Bar Association at the St. Louis Exposition (1904).

2. I am pleased to be able to admit that Endemann ("*Lehrb. des bürgerl. Rechts*," 8th ed., I, p. 84, note 9) has also opposed the partiality shown to the *lex patriæ*. He too refers to the unbounded confusion which would result if each person were treated with reference to his native law in all matters. It is a considerable mistake to believe that the unconditional application of the *lex patriæ* represents the triumph of a grand and fruitful conception; the very contrary is true. If the *lex patriæ* were to be made the basis of the modern doctrine, the expression of Agobard cited in the historical sketch (*supra*, § 17) would in truth be realized. I quoted this sentence at The Hague to point out the danger in its proper light (*Actes*, 1900, p. 86).

§ 46. Reference and Re-reference.

Labbé, *Journal de dr. i.*, xii, p. 5.

Bartin, "*Théorie du renvoi*," in *Revue de dr. i.*, xxx, pp. 129-187; 272-310.

These papers have appeared separately under the title: "*Études de droit international privé*" (Paris, 1899).

Buzzati, *Il rinvio nel diritto internazionale privato* (1898).

v. Bar, in *Zeitschrift für internat. Privat- und Strafrecht*, viii, p. 177.

Buzzati, *id.*, p. 449.

Kahn, in *Ihering's Jahrbücher*, N. F., xxiv, p. 366; xl, p. 52.

Zitelmann, i, p. 238.

Keidel, "*De la théorie du renvoi du droit international privé selon le nouveau Code civil allemand*," in *Journal de dr. i.*, xxviii, 1901, p. 82.

Fiore, *id.*, xxviii, pp. 424, 681.

I. *Theoretically speaking, neither "reference" (including "further reference") nor "re-reference" are proper means of solving international conflicts.*

1. These terms may be explained as follows: Where the internal law has no direct rule for the solution of a conflict of law and expressly makes its decision dependent upon the rule of conflict of a foreign state, we say that the conflict has been solved by *reference*. Where the foreign state thus referred to also presents no independent decision of the conflict, but refers again to another system of law, we speak of *further reference*. By *re-reference* is meant that case in which the law of the foreign state neither presents an independent solution of its own, nor refers to a further system of law, but in which it refers back again to the law of the internal state and provides that *its* law (the *lex fori*) shall be applicable.

These methods are not sound, because they really do not solve conflicts at all. The legislature sometimes leaves us in doubt

whether or not any of these methods are intended; in other words, whether the court of the local state should decide the case in the same manner as the court of the foreign state whose law is referred to would do, if the same conflict arose before it, or whether only the substantive law of the foreign state is to be applied. Assume a case in which the rights of a Dane or of an Englishman residing in Italy are involved. An important preliminary question would probably be as to what law determines his capacity to act (*status*). The law of Italy declares that the national law applies. But as both England and Denmark hold that the law of the domicile (in England, the place of sojourn in some matters) is applicable, one might think that Italian law should determine, for in applying *it*, we are doing that very thing which the national law sanctions.

But unless a rule of conflict expressly *intends* these methods, they should not be employed. If foreign law is made applicable to determine a relationship, *that* law should be applied without considering whether the foreign state, by its own rules of conflict, would apply its own system of private law or not. Of the same opinion are Regelsberger, "*Pandekten*," i, pp. 164-165; Zitelmann, i, p. 243; Catellani, "*Del conflitto fra norme di diritto internazionale privato*" (Venice, 1897), p. 49.

2. The highest courts of France, Germany, and Switzerland have differed upon this question. Compare: German Imperial Court (*Reichsgericht*), xxiv, p. 326; Swiss Federal Court (*A. E.*), xx, p. 653. In the latter case (1894, *Fischl v. Codmann*), the court, in determining the capacity of a married woman to act, held that *the real will of the legislature* (Art. 10, Fed. St. Pers. Cap.) was to apply the national law, without consideration as to whether the national law itself would apply the principle of nationality or territoriality.

Wolf (*Z. f. Schweiz. R., N. F.*, xv, p. 21) opposes this theory and maintains that by the term "national law" the legislature intended not only the substantive law, but also the national rules of conflict; that if we shut these out, we no longer apply the will of the foreign state, but a system that it really intended to exclude. This reasoning is not sound, as it is the will of the local state which is authoritative. The weight of authority favors the view taken in the case cited.

II. *If reference, re-reference, or a similar method of solving conflicts is sanctioned by positive law, it must of course be followed.*

1. A reference may be total or partial.

2. The law of Germany recognizes a kind of reference in certain branches of the law. More definitely stated, it makes the application of foreign law in those cases dependent upon certain requisites in the foreign law itself. The German Introductory Act states its rules of conflict in absolute terms, from which it follows that in applying foreign law it is immaterial what rules of conflict the foreign law contains. The foreign substantive law is considered and not the foreign International Private Law. To this, however, certain exceptions have been enacted in Art. 27 in respect of :—

- (a) capacity to act ;
- (b) entrance into marriage ;
- (c) marital property ;
- (d) divorce ;
- (e) succession.

The question of reference becomes a practical one, however, only where the contest is between the *lex patriæ* and the *lex domicilii*, not where the rule of conflict is drawn from the *locus* of an object, *i.e.* where the *lex rei sitæ* or *lex loci actus* is made applicable (Art. 28).

These regulations are very important, especially over against English and American law (see § 7, III, 2, *supra* ; also Goldmann and Lilienthal, "*Das bürgerliche Gesetzbuch*," 1897, pp. 18–19 ; A. Nieder, "*Das Einführungsgesetz*," 1899, pp. 68–71, upon Art. 27). Whether reference is to be made only in the cases mentioned, or whether its use may be still further extended, is a question still in dispute in Germany.

3. The Japanese Statute of 1898 (*Ho-rei*) upon the Application of the Laws in General, contains the following provision (Art. 29):

"In a case in which the native law of a person is authoritative, and such law by its own terms makes the Japanese law authoritative, the latter shall be applied."

III. *The Institute of International Law terminated its discussion upon reference with the almost unanimous resolution, that in cases of reference the general substantive law and not the rules of conflict should be considered (Annuaire, p. 179).*

The resolution reads as follows :—

“ Quand la loi d'un État règle un conflit de lois en matière de droit privé il est désirable qu'elle désigne la disposition même qui doit être appliquée à chaque espèce et non la disposition étrangère sur le conflit dont il s'agit.”

NOTES

1. Lainé says (*Journal de dr. i.*, xii, 1885, p. 16) : “The legislature under whose authority the judge having jurisdiction of a matter is placed has the right to determine the law applicable to the cause. When it has designated a foreign system of law for the solution of a question, the judge has no longer to demand the will of the foreign legislature as to what system of law is applicable; he knows it.”

2. In this connection the views of Asser are also well worthy of note : “*La question du renvoi devant la troisième conférence de droit int. privé,*” in *Revue de dr. i.*, Deuxième Série, ii, pp. 316-319.

3. Dernburg, “*Das bürgerl. Recht des Deutschen Reiches und Preussens,*” i, § 36, p. 97, favors Germany's adoption of “reference.” In my pamphlet, “*Int. Priv. Recht und die Staatenkonferenzen im Haag,*” pp. 30-31, I pointed out that reference might be adopted in many cases for *practical reasons*, in view of the divergences existing in the rules of conflict. The methods of reference which have already been adopted by legislation represent a wholesome limitation of the present tendency in Europe to accentuate the *lex patriæ*.

§ 47. Outlines of the Categories of Law Applicable in Modern International Jurisprudence.

I. “*Statut personnel*” or *personal statute*.

1. By this term is designated, in the first instance, that system of objective law, authoritative in determining capacity to act, or the capacity to enter into legal relationships. *At one time, domiciliary law is meant; at another, national law,—according to whichever doctrine the lawmaker supports.*

2. Frequently the term is employed by way of parallel, to express the idea *that a certain legal question (e.g. guardianship or succession) is determined by the same law as that which determines the capacity to act.*

An incorrect notion has arisen in many quarters, that the same concrete solution as is applied to questions of capacity to act must also be able to decide *all* questions arising in International Private Law—a view that is untenable. It is wholly impossible to include all the rights and legal “capacities” of a person within his status and thus submit them to the personal statute. This is a remnant

of the tendency which existed in the early development of the science, to solve all difficulties by general axioms or classifications such as that of real, personal, and mixed laws. It would be more correct to avoid allusion to this classification altogether, as the institution that called it forth has disappeared from the modern world; but its terminology has become so deeply rooted that all efforts to change it seem to be vain.

II. "*Statut réel*" or *real law*.

1. This term is used to express the idea that the local law is applicable, *e.g.*, because the right in question is in the nature of a *property* right or right *in rem*.

2. The term is also employed to designate that group of rules applicable to aliens as well as native citizens because founded on motives of social or public order; *e.g.*:—

- (a) pursuant to the doctrine of the Italian School, although the more usual term is "territoriality" of laws (see *infra*);
- (b) in the sense of Laurent, ii, Nos. 52, 58, 193, 204; viii, No. 95, wherein he speaks of "*lois réelles*";
- (c) in the sense of Savigny, when he speaks of laws of "*streng positiver Natur*."

III. *Territorial law* or "*statut territorial*."

This is another term frequently used in contradistinction to domiciliary and to national law. Like the term "real law," it expresses the idea that certain relations or transactions are judged according to the local law without considering either the domicile or the nationality of the parties in interest, as, for instance:—

- 1. the rights of aliens in England and America in respect of many relationships;
- 2. Art. 7, German Introductory Act;
- 3. Art. 10^a, Swiss Federal Statute upon Personal Capacity to act (*Handlungsfähigkeit*).

The term "statute" is employed in connection with these categories only for *historical* reasons. Statutes as distinguished from laws no longer exist, and it is well to remember that this nomenclature originated with a system now obsolete. The terms are retained because, through many centuries of use, they have become the currency of speech.

NOTES

1. The term "*statut personnel*" is still employed in modern codes, e.g., Egyptian *Code civil*, Art. 4.
2. Aubry, "*De la notion de territorialité en droit international privé*," *Journal de dr. i.*, xxvii, 1900, p. 689; xxviii, 1901, pp. 253, 643.
3. The term "*loi territoriale*" has latterly also been employed in another sense. Vareilles-Sommières ("*La synthèse du droit int. privé*," i, p. 166) says: "For us, territorial law is that which applies only to acts done within the territory. A law is territorial for us when it is binding only on natives, and obliges them to act, or abstain from acting, only within the territory."

§ 48. Reasons for the Application of Foreign Private Law.

I. *There is a great disparity in the reasons assigned for the application of foreign private law in certain cases.*

1. It is often said that the reason why foreign law is recognized only in certain respects is because sovereignty is called into question by the application of foreign private law. There is considerable error in this conception, and it has led many writers to wrong conclusions.

In applying foreign law, a local judge does not violate the sovereignty of his own or of another state; he is, by virtue of his office as a servant of the internal state, applying that private law which, according to his judgment as based upon the internal rules of conflict, is applicable to the disputed issue before him. The application of foreign law is in no wise dependent upon the judge's preference. In other words, the judge's standard is always the law of the internal state, but that *includes* also those rules of conflict which the internal state has provided for international issues. It is true that often very little is expressly provided; indeed, as a rule, it is fragmentary. But the judge cannot be governed by the internal substantive law, where rules of conflict fail, for this has *local* and not international relations in view. He must work out the rules of conflict from the theory and practice existing within the state. Internal private law and internal rules of conflict must be distinguished.

2. The duty of the local judge to apply foreign law has been based upon the common weal existing between the nations in legal matters. Compare Savigny, "*System*," viii, pp. 27, 29. The conception has been quite generally adopted. Dernburg, "*Pandekten*," i, § 45, has the same idea in mind when he says that the mutual recognition of the states has led to a mutual recognition of their laws.

Among Italian authorities I refer to Catellani, "*Il diritto internazionale privato e i suoi recenti progressi*" (1st ed., No. 51), and his pamphlet, "*Del conflitto fra norme di diritto internazionale privato*" (Venice, 1897), p. 1, wherein he says: "*Il diritto internazionale privato, concepito come un sistema ideale di norme, dovrebbe nel suo insieme ed in ogni sua parte corrispondere alla comunità di diritto vagheggiata dal Savigny.*"

3. The "*comitas gentium*," or comity of nations, has been cited as the true ground from Ulricus Huber to the latest times, e.g. Foelix, p. 22; Kent, ii, 454 (614); Story, Nos. 35-38, and even Stobbe, "*Deut. Pr. R.*," 1st ed., i, § 29 i. This basis is weak and should be abandoned. I refer to the conclusion of the *Institut* (*Annuaire*, i, 124):—

"IV. Dans l'état actuel de la science du droit international, ce serait pousser jusqu'à l'exagération le principe de l'indépendance et de la souveraineté territoriale des nations, que de leur attribuer un droit rigoureux de refuser absolument aux étrangers la reconnaissance de leurs droits civils, et de méconnaître leur capacité juridique naturelle de les exercer partout. Cette capacité existe indépendamment de toute stipulation des traités et de toute condition de réciprocité. L'admission des étrangers à la jouissance de ces droits, et l'application des lois étrangères aux rapports de droit qui en dépendent, ne pourraient être la conséquence d'une simple courtoisie et bienveillance (*comitas gentium*), mais la reconnaissance et le respect de ces droits de la part de tous les États doivent être considérés comme un devoir de justice internationale. Ce devoir ne cesse d'exister, que si les droits de l'étranger et l'application des lois étrangères sont incompatibles avec les institutions politiques du territoire régi par l'autre souveraineté, ou avec l'ordre public tel qu'il y est reconnu."

We must definitely lay aside the theory of *comitas gentium*. Lorimer well says ("Institutes of the Law of Nations," i, 357), "Private international relations are relations of right on the one hand and duty on the other," and he alludes to the doctrine of *comitas* as "the old woman's fable."

4. Von Bulmerincq ("*Das Völkerrecht*," in the Handbook of Marquardsen, p. 208) says that there is a duty among the states to make mutual concessions. He adds that these are not to be conceived of as favors, but as in performance of a duty toward members of an international commonwealth; that a legal right to them exists mutually.

II. *Foreign civil rules of law are applied because justice demands it in certain cases. To international issues, that system of private law must be applied to which they are subject; this may be local law, but it may also be foreign.*

As soon as a foreign state is recognized as such by the local state, it must be considered as a member of the family of nations by right of public law (Mohammedan countries occupy a special position by treaty). From this follows the right of its subjects to enter into legal relationships with the subjects of the local state, and to demand that the system of private law be applied which is appropriate within these territories by reason of their rules of conflict.

It is clear that to private relations, only a rule of *private* law should be applicable. The native judge does not apply foreign substantive law because of the statutory orders of the foreign state. Legislative authority in each state is limited by the geographical boundaries of that state. But the native state says to its judge that he must apply the correct system of private law, and with this command, external as well as internal civil law may be indicated. The Code of Private Law of the Canton of Zurich (§ 1) correctly states that internal law is applicable to natives and aliens unless, by reason of the peculiar nature of an issue, the application of foreign law within the local territory or the extension of local law to foreign territory is demanded.

By virtue of this brief premise of the local law, issues are referred to the *lex domicilii*, or *lex patriæ*, or *lex loci contractus*, or any other *lex* appropriate to the same. To speak of the "nationalization" of foreign private law is wholly incorrect; this figure does not enlighten the matter, it obscures it.

All systems of civil law are, upon principle (with the reservation made), of equal value, and the *lex fori* has in itself not the slightest right of priority to be applied to a disputed issue of law.

The duty of the internal judge to apply foreign civil law when the rules of conflict subject the issue to it, is, as Rivier well says, an "*obligation juridique*," with which Wharton (§ 1 *et seq.*) also is in complete accord. Gierke ("*Deutsches Privatrecht*," p. 212) brings out the correct idea in that he says:—

"*Foreign law is law.* It is as much law as native law, and therefore applicable by our courts whenever an issue is subject

thereto. This is the first principle of modern International Private Law. It is the real ground for applying foreign law, and is founded upon the demands of justice which each state must satisfy in performing its functions, not, however, in the mere mutual courtesy of nations (*comitas gentium*) according to an old theory that has not yet completely died out. The application of foreign law results, when appropriate, by virtue of a general *rule*, not, as some think, by virtue of an exception to the rule. Especially untenable is the view that there is a presumption in favor of the exclusive application of native law."

It is an entirely independent question whether the internal judge may or must compel the parties to prove the existence and meaning of foreign rules of law. This must be specially treated of under the head of International Civil Procedure. Here it suffices to say that the internal judge may issue a decree compelling proof of law (in the manner of Continental practice). As we are here dealing with a question of law, it follows that the term of proof (Continental practice) is not peremptory, and, further, that an admission is not binding upon the party. A noteworthy proposal covering this question was laid before the Hague International Conference of 1900 by the Austrian delegate Schuhmacher. The proposal was entitled: "*Dispositions concernant la délivrance de certificats sur la législation en vigueur dans un État*" (*Actes de la troisième Conférence*, 1900, p. 60). A committee considered the proposal and submitted amendments (*Actes*, pp. 205-206). The conference then entered upon a brief preliminary argument and decided to cover the question for the time being by a resolution (*Protocole final, Actes*, 1900, p. 246).

Of course the internal state *may*, by legislative command, insist that internal law be always applied, and never foreign law. Such a perverse rule has almost never been laid down, and even nations are under the control of ridicule. A state which adopted such measures would be acting against the fundamental principles of international law, and would be ignoring its own interests.

The legal basis of International Private Law, notwithstanding opposition in certain quarters, is therefore the conception so beautifully and well expressed by Savigny — the community of interest existing between the states in the administration of the law (*Rechtsgemeinschaft*). Of course, this conception requires concrete application and detailed development.

III. *The doctrine prevailing in England and America still rests upon a wholly antiquated foundation.*

Indications are multiplying that even in England the feudalistic point of view is losing ground. A convincing proof of the rise of a new scientific tendency is furnished by the work of Dicey. In view of English conservatism it will require much time and great labor to reform the basic principles of International Private Law prevailing in England — not to speak of the details.

NOTES

1. Travers Twiss, "Law of Nations," i, pp. 258-259, is entirely governed by the spirit of the Dutch School so far as he treats of International Private Law. "No law is operative *proprio vigore* beyond the limits of the territory of the state which has set it." Reference is made to Huber, Rodenburg, Kent, etc.

Story cites the *dicta* of a learned judge (Parker C. J. in *Blanchard v. Russel*, 13 Mass. 6) as follows, § 349: —

"As the *laws of foreign countries* are not admitted *ex proprio vigore*, but merely *ex comitate*, the judicial power will exercise a discretion with respect to the laws which they may be called upon to sanction." Story says ("Conflict of Laws," § 36): "It is in the strictest sense a matter of the comity of nations and not of any absolute paramount obligation superseding all discretion on the subject." And at § 38: "There is then not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another."

On the other hand, it is interesting to note Dicey's treatment. He expresses himself clearly as against the doctrine of *comitas* in that he says (pp. 10-14): "The application of foreign law is not a matter of caprice or option, it does not arise from the desire of the sovereign of England, or of any other sovereign, to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases *without gross inconvenience and injustice to litigants, whether natives or foreigners.*" Wharton also opposes the theory of *comitas*; see §§ 1 *et seq.*

2. It may be said that the conception generally adopted is that the internal law applies with such limitation as is demanded by a respect for international intercourse. This is true whether the internal law specially so states or not. However, the reasoning of Cosack ("*Lehrb. des deutschen bürgerl. Rechts*," i, p. 45) is not exactly to the point when he speaks of a *self-limitation* of native law, by which, under circumstances, foreign law is applied.

3. Formerly it was often said that it required a particular consent on the part of the internal law to have recurrence to foreign law. A characteristic passage may be found in the argument to Art. 997 of a draft for a code of commerce for the kingdom of Württemberg (Stuttgart, 1840, p. 764).

4. The Zurich Code of Private Law (§ 1) proclaims a general proposition which is entirely correct as a theoretical basis — though by its nature not determining very much. It is to the following effect: —

"The private law of Zurich binds, primarily and solely, persons, natives and

aliens, who live in the canton of Zurich or are temporarily present there, or seek a legal remedy there; and it controls all private relations which come into operation in this country, except in so far as the peculiar nature of the special legal relation requires either the application of a foreign law upon the territory, or the extension of the law of this territory to a foreign country."

5. Catellani, "*Del conflitto fra norme di diritto internazionale privato*" (Venice, 1897), p. 51, well says: "*il fondamento delle regole di diritto internazionale privato non è né la comitas gentium né una concessione graziosa relativa alla protezione degli stranieri. . . . Il diritto internazionale privato corrisponde all' idea della comunità di diritto così egregiamente delineata dal Savigny.*"

§ 49. The Task of Science.

1. *The task of science in this branch of law embraces the following objects:—*

1. To establish rules of conflict within the separate countries, and to determine their significance.

2. To test those rules which seem of doubtful value, and to attempt such improvements as seem necessary from a comparison with the rules of other states. For this, co-operation is essential. It is a misconception to believe that all that is necessary is an *external* classification of the rules of law, and therefrom to deduce which clauses are applicable both to citizens of the state and to aliens living or sojourning therein. This is just what the statutory doctrine did, and it was the cause of its downfall. It is also incorrect to believe (as Pillet in *Journal de dr. i.*, xxi, 419) that it is only a matter of electing whether a law shall have territorial or extra-territorial effect.

3. To determine, in the *particular* cases, the system of law under which certain groups of issues shall be placed, so as best to subserve a rational cosmic intercourse between the nations. The whole subject-matter should be conceived of and treated from the cosmopolitan standpoint. Whoever does not so proceed will remain on the narrow path of particularistic conceptions, and will never attain the broader horizon which is here, as perhaps nowhere else in equal degree, so necessary.

The study of International Private Law should be taught and studied at the most celebrated universities. There are a few countries (as, for instance, Germany and Austria) where this subject is still fighting for proper recognition. It is significant of the lukewarmness shown toward International Private Law by German universities that this important topic is not separately treated of in

Birkmeyer's newly published "Encyclopædia of Law" (1901), contrary to the practice of his literary predecessor, von Holtzendorff. It is also notable that under the heading of academic instruction (pp. 67-70) no mention at all is made of International Private Law. There are only some sporadic references and a few treatises upon international topics; "international civil law" is covered on pp. 371 and 372, the "international law of bills" is cited on pp. 709, and "international civil procedure" on pp. 1194 and 1195.

II. *In reconstructing international rules of conflict, reference must be had:—*

1. to the whole range of the history of jurisprudence. What the old authors said upon the *collisio statutorum* is mentally stimulating and has not lost its significance through the lapse of time; their deductions deserve consideration now as then. Of course we must retain their environment in mind, at least in rough outline, in order to arrive at a complete understanding of their attitude

2. to judicature;

3. to foreign as well as local authorities. Here less than in any other department of law does it suffice to study the literature of only one country. Of course we may well proceed with a certain eclecticism;

4. to international treaties bearing upon the conflict of laws;

5. to the South American proposals;

6. to the proceedings of the International Conferences at The Hague. The proposals worked out at The Hague, to my mind, prove, in the sharpest and most convincing manner, the incorrectness of the belief that with the help of logic and International Law (as reserve forces) the appropriate solutions can always be found;

7. to the conclusions and reports of the *Institut de droit international* and the Association of International Law. The labors of these private societies are, to a great extent, not sufficiently appreciated. The German authorities in particular (with the exception of von Bar, Niemeyer, Kahn, and Störke) have taken almost no notice of them. The results of the *Institut* are most eminently significant.

At this point we may mention the necessity of undertaking a fixation of the "seat" or locality of issues, remembering that Savigny only formulated the problem anew and advanced a solution not tenable for all purposes.

III. *The task of the modern science of International Private Law may be solved in a variety of ways.*

1. A careful completion of the rules of conflict in accordance with present ideas might be attempted in the codes of the separate states. By this method, every state would be proceeding by itself, though influenced by such principles as obtain generally in the modern science of the law.

2. The International Conferences elaborated their treaties with the understanding that the separate states should either accept or reject them ("*ne varietur*"). Where only two states attempt to regulate certain questions of International Private Law, no difficulties can arise with regard to the temporal and local effect of the treaty. But the proposals worked out at The Hague go farther; they have in mind a treaty regulation of the question of conflict upon the broad platform of almost the whole of Europe. This element without doubt draws the danger with it, that the treaty will contain far too many concessions, exceptions, and restrictions. It is therefore a question for careful reflection whether a *complete European* regulation of the conflict of laws must not be postponed until the views of the internal jurisdictions cease to differ so radically.

If so high a purpose can really be accomplished, it should be warmly welcomed. But even such an international understanding would, on principle, be effective only within the territory controlled by the contracting powers (Art. 1 of the treaty relating to marriage goes further; see Appendix I). The third International Conference decided that the treaties shall not apply to colonies, but because the relation of Algeria to France is closer than that of a colony, the clause was made to read that the convention shall refer only to the European territory of the contracting states. With regard to the admission of the states to the benefits of the convention, a distinction has been made. Those who sent delegates to the third Conference are admissible on their own declaration; others, however, only upon unanimous consent. The treaties are to be effective for five years as between all the states, and go into effect sixty days after ratification. The conventions upon marriage and divorce occupy a peculiar position. That upon marriage refers only to such marriages as have taken place *after* the treaty has become effective. The law as it existed before the treaty will be applicable to contested marriages, performed prior thereto, because

dealing with legal events, the effects of which are dependent upon the law existing at the time they occurred. It is different in matters of divorce. There we have mostly to deal with rules of procedure, which, from their nature, are applicable without consideration as to the time when the marriage was entered into, or when the grounds for divorce arose. There is no vested right of married persons to be divorced according to the laws existing at the time of their marriage.

No matter what method we follow, it remains clear and certain that in order to accomplish a really acceptable result, we must definitely decide to bid farewell to the Dutch School, the barrenness of which must be clear to-day to every one who earnestly reflects upon our topic. Real progress in International Private Law can only be accomplished in the spirit which dominated the International Conferences at The Hague—we must enter upon the details of the question.

IV. *It is especially necessary to provide for an official collection of the treaties.*

Reference may be had in this connection to:—

Meili, "*Eine offizielle Heimstätte für das Peregrinenrecht der modernen Welt*," in *Jahrbücher der internationalen Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre*, i, pp. 24-59.

NOTES

1. Unfortunately there are jurists to be found even to-day who are under the ban of the doctrine set up by the Dutch School, the whole valuelessness of which is sharply brought out in the words of Huber himself: "*De jure civitatis*," liber III, sect. IV, cap. I, No. 31: "*In summa, quoties conflictus legum in diversis civitatibus circa idem negotium occurrit, potestas loci, ubi res judicanda est, si velit potest et quidem jure suo per omnia sequi leges proprias; sed ob reciprocam utilitatem in disciplinam juris gentium abiit, ut jus loci, in quo res gesta fuit, prævaleat; nisi rursus in contrarium utilitas alterius reipublicæ præponderet.*" Compare Hölder, "*Kommentar zum bürgerl. Gesetzb.*" (1900), p. 51. This jurist, remarkably enough, believes that, in a question of doubt, the internal law has the preference.

2. Some engaged with the science of our topic have almost given up in despair. See B. J. Voet, "*Ad Pandectas*," i, tit. iv, part ii, No. 15. He speaks of "*intricatissimæ ac prope inexplicabiles controversiæ.*" This is also repeated by Alef in "*Dies academici*," at the beginning of dissertatio iv: "*si in ulla juris parte perplexæ admodum sese obtrudant quæstiones sane in hac de legum, consuetudinum statutorumque conflictu agitur, intricatissimæ ac prope inexplicabiles surgunt controversiæ.*"

See also Bouhier, "*Les coutumes du duché de Bourgogne*," i, p. 450; Froland, "*Mémoires concernant la nature et la qualité des statuts*," i, pp. 3, 8, 26; Hertius, "*Commentationes*," vol. i, sectio iv, § lxxiv; F. Hamm, "*De statutorum collisione*," Erlangen, 1792, p. 13: "*veniamus ad illam difficilem et quæstionem*." Story, "*Conflict of Laws*," 8th ed., p. 15 n, cites an American judge who refers to our topic as "a subject the most intricate and perplexed of any that has occupied the attention of lawyers and courts . . ." (Porter J. in *Saul v. His Creditors*, 5 Mart. N. S. La. 569, 588).

§ 50. Interpretation in International Private Law.

I. *Generally speaking, the recognized rules of interpretation apply also to our topic.*

This is true in regard to:—

1. statutes, customary law and usages ;
2. inquiries of a private legal nature (*e.g. bona fides* ; real intention of the parties) ;
3. treaties. It cannot be questioned that the civil courts may interpret such treaties as apply to questions of International Private Law. In France it has been held that they have no such competence (*Conseil d'État*), or at least not when a question of public order is involved (*Cour de cassation*)—in the latter instance the decision must be referred to the National Government. But such a distinction is unfounded on principle. Compare Appert, "*De l'interprétation des traités diplomatiques au cours d'un procès verbal*," in *Journal de dr. i.*, 1899, xxvi, pp. 433-461.

II. *Interpretation of legal transactions, in the absence of express rules of conflict:—*

1. Upon principle, the question of interpretation is determined by that system of law which governs the legal relationship as a whole.
2. Beyond this, each case must be examined for itself in order to see whether the parties did not intend a different system of law to control in the interpretation of particular expressions or terms. Here we find difficult problems for the judge. Frequently he will conclude that the real meaning of the transaction must be sought in the light of points of view, conceptions, or requisites which do not exist in the system of law otherwise applicable (Savigny, viii, p. 265). In this connection the language customarily used in similar contracts may be of assistance (*e.g. in shipping contracts* ; v. Bar, ii, p. 219). After deciding the question of the objective system of law to be applied, we should not absolutely shut out consideration of any other law. Each case has such a different coloring that it is impossible to formulate general principles.

III. *In the interpretation of laws or of legal transactions, reasonableness must prevail, especially with a view to sustaining foreign transactions of a formal character.*

This proposition is often expressed in the statutes (*favor negotii*). It may be found in:—

1. Prussian *Landrecht*, i, 5, § 113:—

“If a contract has been made only through correspondence, without the execution of a formal instrument, and there is divergence in the legal forms prevailing at the places of residence of the contracting parties, the validity of the form is to be determined by the law of the place *according to which the transaction can best be sustained.*”

2. Austrian Civil Code, § 35.
3. Lucerne, Code of Private Law, § 25.

A provision to the same effect is proposed by Petruschevecz (Art. cxcii):—

“Un engagement pris dans un état quelconque par un étranger et en vertu duquel il confère des droits à des tiers sans les obliger réciproquement envers lui sera jugé dans cet état soit d’après la loi de cet état soit d’après la loi de la patrie de l’étranger, suivant que l’une ou l’autre favorise le plus la validité de cet engagement.”

The interpretation of wills is discussed under a special head. See *infra*, § 146.

NOTES

1. Story, § 270, says upon interpretation: “The object is to ascertain the real intention of the parties in their stipulations; and when the latter are silent or ambiguous, to ascertain what is the true sense of the words used and what ought to be implied in order to give them their true and full effect. . . . But in many cases the words used in contracts have *different meanings* attached to them in *different* places by law and by custom. Hence the rule has found admission into almost all, if not into all, systems of jurisprudence, that if the full and entire intention of the parties does not appear from the words of the contract, and if it can be interpreted by any custom or usage of the place where it is made, that course is to be adopted.” I refer also to E. Danz, “*Die Auslegung der Rechtsgeschäfte*,” 1897, p. 147. This author is of the opinion that the rules of interpretation of the German code must govern even when a matter of foreign law is in question; the judge has to determine in whose favor a doubt must be resolved, as to which trade customs can be applied, etc., etc. Danz refers in this matter to Art. 30, Introductory Act, but I cannot admit his reasoning to be correct.

2. The revised Code of Civil Actions of the Canton of Berne (1883) expressly states at § 281 that in determining an issue according to the provisions of a treaty, the courts are empowered to interpret.

3. A formal transaction can never be invalid simply because a foreign language has been employed; in view of the cosmopolitan character of modern commerce no one would think of denying this.

4. Compare also: Phillimore, iv, p. 571: "Surely, the first principle of private international law is namely the duty as well as the expedience of upholding, wherever it is possible, *bona fide* transactions with the subjects of foreign states."

§ 51. So-called Fraud against the Internal Law.

I. *A fraud against native law can only be constituted where the internal legislation categorically demands the application of its rules of law, and where it does not tolerate avoidance or modification by means of international change of locus. When the provisions of an internal law are not of so absolute a character, the right to rely on foreign law by reason of such change is recognized.*

1. The question frequently arises as to how a fraud against the native law shall be treated. How far is an act invalidated for the reason that a native subject has purposely taken advantage of laws existing in a foreign state. The question arises particularly:—

- (a) in the acquisition of domicile, because through this element an entire change of private rights may take place;
- (b) in the acquisition of a new citizenship (v. Bar, i, pp. 223–226); we may consider for instance how the husband's change of nationality may affect the personal property rights of the wife;
- (c) in questions of legal formalities;
- (d) in solemnizing marriages (v. Bar, i, p. 470);
- (e) in regard to wills.

Many acts performed abroad were construed by the early authors as "*fraus in legem domesticam*." Thus Huber, in his work, "*De jure civitatis*," liber iii, sectio iv, cap. i, No. 29, says: "*Hoc indubitatum est non tenere potestates, sequi jus alienum in fraudem sui juris vel civium suorum*." This is also referred to in regard to wills (liber iii, sectio iv, cap. i, No. 28). In his comments upon the Bavarian Civil Code of Maximilian, Kreittmayr says (Munich, 1759, i, p. 22):—

"The binding character of the laws reaches even *extra territorium legislatoris* as against a subject acting in *fraudem legis* outside of his state in order to have a freer hand."

Of course Kreittmayr cites some rather peculiar examples for this proposition. He continues:—

"From this principle it follows that we punish a subject who, for example, ingeniously celebrates a marriage in a foreign place in order to be able to invite more guests than the police ordinances allow, or who visits a foreign inn over the border in order to escape paying the tax on beer or wine."

2. Theoretically speaking, subjection to the control of foreign law does not take away jurisdiction of the act from the native law; indeed it may establish it (compare Regelsberger, "*Pandekten*," i, pp. 170-171, and Gierke, "*Deutsches Privatr.*," i, p. 231). In each case it must be determined whether, pursuant to the rule of conflict, an "*agere in fraudem legis domesticæ*" annuls the act. As has been said, without a definite provision it will *not* have that effect. We may cite two conflicting examples out of Swiss law:—

- (a) The authorization given by the Federal Council to acquire citizenship was annulled in one case because the Council became convinced that the party desired to become a Swiss citizen only for the purpose of obtaining a divorce against the prohibitions of his native law (*Bundesblatt*, 1892, ii, p. 184).
- (b) The provisions of Art. 25, Federal Statute upon Civil Status and Marriage make possible the recognition of marriages entered into by native citizens abroad, against the prohibitions of the internal law (*Bundesblatt*, 1895, iii, p. 63).

II. *There are some laws which take notice of an "agere in fraudem legis domesticæ" in certain directions only.*

1. Examples are furnished by the Codes of Zurich (§ 5) and Zug (§ 5) whereby the rule of "*locus regit actum*" is limited so as to make invalid within the state:—

- (a) such instruments as are executed abroad in order to circumvent the internal forms;
- (b) such instruments as are controlled by peremptory provisions on account of public considerations.

The Code of Zurich (§ 8) cites as examples, pledges of household goods (§ 403) and contracts for lifelong maintenance (§ 476).

Within this rule is also included adoption (Zurich, § 720) and contracts between ancestor and descendant and between husband and wife (§ 443). In these cases, the observance of foreign formalities will not suffice (Gierke, i, p. 231, note 60).

2. There are also statutes bearing specially upon the legal effect of a change of citizenship.

In America and England

The rule as stated above (I) probably also embraces the effect of the decisions in America and England, but only in so far as a particular inhibition or disability of the internal law has attached itself to the person of the party in question, so as to become part of his personal law. In other words, a fraud against the domestic law will not in itself invalidate a transaction validly completed in another jurisdiction, although it may serve to point out that one system of law is applicable rather than another. For example, where the validity of a marriage contracted abroad is in question, the matter for determination will be whether a domicile has actually been acquired, the domicile being the test of the personal law. As we have seen, domicile is to a large extent a matter of intention and thus the question whether the removal to the foreign state was in good faith, or merely to avoid the domestic law, will enter as an *element* in determining the domicile. Where it is clear that the removal to a foreign state was solely to defraud the internal law so as to contract a marriage void by that law, the marriage will not be recognized (*Marshall v. Marshall*, 2 Hun 238; *Pennegar v. State*, 87 Tenn. 244). The rule was applied in England, where the parties removed from England to Denmark to avoid the law against marriage with a deceased wife's sister (*Brook v. Brook*, 3 Sm. & Gif. 48; *aff'd* 9 H. of L. Cas. 193). On the other hand, a divorce obtained after the removal to a foreign state has been upheld, where the court was satisfied that the bringing of the action was not the sole purpose for the removal, although it may have been one of the motives for so doing (*In re Hall*, 1901, 61 App. D. N.Y. 406).

The execution of documents in a foreign state in order to avoid the revenue laws will not invalidate the instrument, unless expressly so provided by statute, although such an evasion may render the person liable to a penalty (see Wharton, "Conf. of Laws," § 693).

A specific provision is to be found in the Civil Code of Lower Canada (§ 135) in respect of the formalities of marriage ceremonies. It provides that "a marriage solemnized in a foreign country between two persons, either of whom are subject to the Canadian laws, is valid if solemnized according to the laws of the

foreign country, provided that the parties did not go there with the intention of evading the law."

§ 52. The Distinction between Jurisdiction (*forum*) and Substantive Law (*jus*).

I. *The system of substantive civil law applicable to an issue is not determined by designating the court which shall have jurisdiction of the issue.*

This proposition is not sufficiently recognized. It is often said that the local judge is bound by the laws of the land. This has resulted in the following:—

1. Judges are inclined to apply local law wherever there are no express rules of conflict. "When in doubt apply the *lex fori*" ("*in dubio pro lege fori*") is a false maxim frequently adopted.
2. The parties often do not take the trouble to search out the foreign law, or to obtain its recognition in the course of litigation.
3. Even where judges assume to apply foreign law, they often carry over territorial conceptions in its interpretation.

In certain statutes dealing with private law and procedure, it is provided that unless a party expressly relies upon foreign law, the local law will be applied (*e.g.* Art. 13, Civil Code of Argentine). The rule is also to be found in the practice of some countries.

II. *Statutes and treaties sometimes wrongfully identify law with the forum.* This has been the case:—

1. in the treaty between France and Switzerland regulating the jurisdiction of the courts;
2. in the Civil Code of Egypt, Art. 4.

As a matter of practice, issues are, more frequently than not, subject to the system of law which obtains at the venue of the action. This results partly because the *lex fori* applies *properly* to many relationships in International Private Law, and partly because the defendant is often cited at his domicile, or in the country of his citizenship, so that the *lex fori* coincides with the *lex domicilii* or the *lex patriæ*.

III. *The aim of legislatures in fixing the jurisdiction of courts should be as far as possible to have the judge determine issues subject to his own law, so as not to compel him unnecessarily to have recourse to foreign law.*

I expressed this view at the Hague Conferences (*Actes*, 1900, p. 132). It has also been embodied into a resolution by the *Institut de droit international*. It is not of fundamental importance, however.

IV. *Sometimes more than one objective system of law can or must be applied within one and the same case.*

It often occurs that several systems of law are applicable to different parts of the same issue. We may recall:—

1. that the permissive character of the rule relating to formalities (see § 55, *infra*) may make it possible that the substance of a transaction be governed by one system of law, its formalities tested by another;
2. that coercive provisions of one system of law must be observed, where in all other matters another is authoritative. A transaction concerning a loan may be subject to foreign law, the question of interest to the domestic;
3. that certain local rules having for their object the protection of the creditors of the local state as against foreign heirs or legatees, may be applicable, although the substantive rights of such heirs or legatees are determined in other respects by their foreign law;
4. that the system of law governing the law of marital property is different from that governing the personal relations of the spouses.

In America and England

The distinction between *forum* and *jus* is well recognized in these jurisdictions (see Phillimore, iv, No. xlv). But the provisions of a system of foreign law applicable to the rights of the parties, will not be applied *ex officio* by the court, as in the case of local law. Differing therefore from the rule on the Continent of Europe, it must be pleaded and proved like any other fact in the case (*Hanley v. Donoghue*, 116 U.S. 1; *Sloan v. Torrey*, 78 Mo. 623; *Bonelli's case*, L. R. 1 P. D. 69; *Hyde v. Hyde*, L. R. 1 P. & M. 133). It is said "that the courts of a country are presumed to be acquainted only with their own laws" and therefore "those of other countries must be averred and proved like other facts of which courts do not take judicial notice" (*Monroe v. Douglass*, 5 N.Y. 444, 452). It has been held in England, however, that where the evidence of the witnesses adduced is insufficient or contradictory, the courts may investigate the law for

themselves, either by referring to foreign decisions, or the opinions of foreign writers, or even by examining for themselves the text of the law (*Concha v. Murietta*, 1889 L. R. 40 Ch. Div. 543). By the law of some of the States, judicial notice is taken of the laws of other States within the Union (*Hobbs v. M. & C. R.R.*, 7 Heisk. Tenn. 873). This is opposed to the rule prevailing in most of the States (*Huntington v. Atrill*, 146 U.S. 659; *Kelly v. Kelly*, 161 Mass. 171; *In re Cappler*, 85 Ia. 82). But "the presumption, in the absence of proof to the contrary, that the law of a foreign State is like our own, does not extend to positive statutory law" (*Waters v. Spencer* (1904), 89 N.Y. Supp. 693; citing *Bank v. Bank*, 156 N.Y. 472).

NOTE

A sharp distinction between *jus* and *forum* was made even in the Roman law (*Lex* 59 *De judiciis* 5, 1; *lex* 19, §§ 3, 4 *cit.*).

§ 53. The Relation of International Private Law to Internal Civil Law.

v. Bar, i, 95, 127.

Despagnet, Nos. 110-113.

Pasquale, Fiore (Antoine), *Le droit international privé*. 2d ed. i, Nos. 245-259.

Laghi, *Diritto internazionale privato nei suoi rapporti colle leggi territoriali*, Vol. i (1888).

Diena, "*Sui limiti all'applicabilità del diritto straniero*," 1898 (*Estratto dagli Studi Senesi*, xv, 1-2).

One of the most difficult problems that we have to deal with, is how to demarcate theoretically those rules of the internal law which must be observed under all circumstances, *no matter what a foreign system of law may provide*.

1. *Various formulas have been adopted to simplify the problem, viz.:*—

1. The formula of Savigny (§ 35, iii, *supra*) which has also been adopted by other celebrated jurists, such as Unger ("*System*," i, p. 163) and Wyss (*Z. für schweizer. R.*, ii, pp. 95-96). According to this formula, as stated by Franken ("*Deutsches Privatr.*," p. 55), provisions violating the "basic tendencies" (*Grundtendenzen*) of the law of the local state cannot be recognized by it. The formula of Savigny (as thus interpreted) goes too far. Even if we refuse to recognize a certain foreign institution, *e.g.* polygamy, we must at

least recognize those effects which are on a level with our own law. Thus it has been held that the plural wife of a Mussulman and her children born in wedlock must be recognized as legitimate even in monogamic states (German Imperial Ct., xxi, 136; xxix, 90).

2. The Italian School supports the view that the local classification of the law into *jus publicum* and *jus privatum* applies also internationally, and that foreign public law can never be binding on a local court. The objections urged against this solution are as follows:—

- (a) that questions involving the status, though surely belonging to *jus publicum*, should still not be made variable in each jurisdiction; the Italian School would be the last to favor such a result;
- (b) that very many propositions of private law are *combined* with questions of internal public order (*e.g.* those relating to the *law of the family and succession*).

3. A different solution is furnished by Laurent (*e.g.* ii, No. 52) who maintains that so much of the local law as relates to social order ("*les lois d'ordre social*") shall have absolute preference over foreign rules. Compare also Art. 26 of his proposed Belgian code.

4. French jurists (*e.g.* Despagne in *Journal de dr. i.*, xvi, 217) propose the following distinction:—

- (a) *lois d'ordres public absolues*, which embrace all those rules which are applicable also to aliens;
- (b) *lois d'ordre public relatives*, which refer to such matters of the family as marriage, guardianship, etc., and are not applicable to aliens.

5. Brocher ("*Nouveau traité*," i, No. 141) speaks of "*ordre public interne*" and "*ordre public international*."

II. *The correct solution may perhaps be brought out by the following reflections:—*

The internal state can never directly recognize transactions or rights which are regarded by the domestic laws as unqualifiedly objectionable. But this exclusive standard cannot be considered as applicable to the following relationships:—

- 1. to transactions which have been already completed abroad; examples are furnished by judgments in bastardy proceedings,

even where the domestic law does not permit of them (France); judgments upon transactions at markets or exchanges;

2. to transactions subjected to foreign law by the agreement of the parties;
3. to transactions which are subject to foreign law according to express rules of conflict.

Where no particular domestic rule of conflict exists, the question whether local law is binding must depend upon whether the transaction is contrary to international law, or good morals from the standpoint of cosmopolitan intercourse (*Weltverkehr*). Transactions tending to promote the slave trade, smuggling, and insurrection are void and unenforceable because contrary to international law. Again, claims growing out of transactions at a gambling place (*e.g.* Monaco), claims for compensation in obtaining false witnesses, procuring abortion, procuring girls for purposes of prostitution (see Hilty, "*Traité blanche*," *Political Yearbook of the Swiss Confederation*, xv, p. 217), claims of spies or rogues for payment of sums promised, etc., are likewise void and unenforceable because contrary to international good morals.

III. *It would be highly desirable for the legislatures of the various states to expressly and specially indicate which rules shall have an absolute territorial effect.*

IV. *It is just upon this important, though indeed difficult, subject, that some of the existing rules of conflict are extraordinarily vague.*

1. This must be said of the German law. Art. 30, Introductory Act, is to the following effect:—

"The application of a foreign law shall be denied if the same would offend good morals or the policy of a German statute."

2. Dicey formulates the principle as follows (General principles, No. II; compare also pp. 558–563):—

"English Courts will not enforce a right otherwise duly acquired under the law of a foreign country:—

- (a) where the enforcement of such right is inconsistent with any statute of the Imperial Parliament intended to have extra-territorial operation;
- (b) where the enforcement of such right is inconsistent with the policy of English law, or with the maintenance of English political institutions;

- (c) where the enforcement of such right involves interference with the authority of a foreign sovereign within the country whereof he is sovereign."

3. The Code of Property of Montenegro (Art. 7) provides that unless otherwise made applicable by the code, foreign laws shall be considered only in case they are made *expressly* applicable by treaty, or by the *imperative* provisions of a domestic law.

4. The Civil Code of the Argentine Republic (1871) contains the following provisions : —

"ART. 13

"The application of foreign laws in the cases permitted by the present code shall only take place upon the demand of the party in interest having the burden of proving the existence of said laws, excepting, however, such foreign laws as are declared binding by treaties or by virtue of a special law of the Republic."

"ART. 14

"Foreign laws shall not be applied : —

1. if their application offends the public or penal laws of the Republic, the national religion, freedom of worship, ethics, or good morals ;
2. if their application would be inconsistent with the spirit of the law contained in this act ;
3. if they tend to grant a mere privilege ;
4. if the provisions of this code, in comparison with those of the foreign law, would be more favorable to the validity of the transactions."

5. The Japanese Statute (*Ho-rei*) upon the Application of the Laws in General (Art. 30) contains the following provision : —

"If a foreign law, otherwise authoritative, is contrary to public order or good morals, it shall not be authoritative."

In America and England

We have seen that on the Continent there is no uniformity in the classification of imperative rules of local law. In America and England, the difficulty is not with the theoretical rule, but in its application to the particular cases. It is well settled that no

foreign law will be enforced, if it contravenes "established" or "public policy," or tends to "corrupt the morals" of the local state. In applying the rule, courts differ widely as to what foreign laws are contrary to the policy or morals of the community. Compare *Swann v. Swann*, 21 Fed. Rep. 299, with *Pennegar v. State*, 87 Tenn. 244; see Minor, "Conflict of Laws," §§ 6, 9, 152.

We shall see under each heading, when considering the detail, how the rule has been applied. A late case will show to what extremes it has been carried in England. The defendant's husband misappropriated money belonging to the plaintiff, who threatened criminal proceedings unless the defendant would repay it. Under the influence of this threat, the defendant agreed to do so. This contract was made in France and was to be performed there. The plaintiff brought action upon it in England. It was held that, as the contract was obtained by moral coercion, the English courts would not enforce it, even though it might have been enforceable in France (*Kaufman v. Gerson* (1904), 20 T. L. R. 277).

In regard to the recovery of money won at play, or lent for the purposes of gambling, in a country where the games in question are not illegal, there seems to be a difference of opinion in England. Lord Lyndhurst has ruled that a recovery does not tend to corrupt morals in the local state (*Quarrier v. Colston*, 1 Ph. 147). The authority of this decision has been subsequently somewhat impugned (*Wynn v. Callander*, 1 Russ. 293). In America, the weight of authority accords with the earlier English decision (*Thatcher v. Morris*, 11 N.Y. 437; *Sondheim v. Gilbert*, 117 Ind. 71) except where gaming contracts are considered *mala in se* (*Flagg v. Baldwin*, 38 N.J. Eq. 219).

NOTES

1. The question of public order is referred by Kahn wholly to International Public Law. He states that a violation of it by transactions otherwise subject to foreign law, should be construed only when in contravention of rules recognized by International Public Law (*Ihering's Yearbooks*, xl, 2d ser., iv, 44). This view is incorrect. There are many questions connected with public order, even in matters of purely domestic law.

2. The proposed civil code for Switzerland suggests the following formula (p. 251): "Provisions of Swiss civil law established for the sake of public order or good morals are controlling before a Swiss court, absolutely and without exception."

§ 54. Subjection to a Foreign System of Civil Law by Agreement of the Parties.

L. Olive, *Étude sur la théorie d'autonomie en droit international privé* (Paris, 1899).

Aubry, *Journal de dr. i.*, xxiii, pp. 456, 721.

I. *It is frequently stated in practice that domestic law must govern, unless it, itself, points to a foreign system of law. It is also stated that a reference to foreign law must be based upon the existence of some special element in the case. These views are unsound.*

Conversely should it be said :—

1. that frequently the domestic law need not be followed because it does not require its own application ; it is for this very reason that express rules are often lacking ;
2. that it is the *official* duty of the judge to apply foreign law, if the issue is properly subject to it.

II. *Since the days of Molinæus, effect has been given to agreements of parties subjecting their rights to a foreign system of law. The intention so to do must be explicit. This "autonomy" is limited by imperative rules of law (jus cogens), but only by those which are internationally regarded as such.*

The principal exercise of this power is of course to be found in contracts, but it is permissible in other branches also, under certain circumstances and with certain reservations. An interesting example is found in the Swiss Statute, *N. & A.*, Art. 22, relating to *wills* (see § 134, *infra*).

1. The existence of a right or privilege to voluntarily subject one's self to a particular system of law has been denied by Unger (i, § 23, note 79). This author claims that such an election should never be recognized, and that the determination of the law to be applied must always be independent of the will of the parties. There is a semblance of right in the following objections :—

- (a) that an uncertain system of law may thus be made authoritative ; in fact, it may be entirely strange to the parties themselves ;
- (b) that it ousts the native law of its jurisdiction.

Von Bar (ii, p. 4) holds that before giving effect to the will of the parties, we must first determine what the law *allows* the parties to intend. Regelsberger ("*Pandekten*" i, p. 167) is also of this opinion.

On the other hand, Neumann, in his treatise on International Private Law in the form of a proposed Code (1896, p. 144), is of the opinion that the application of foreign law by contract is admissible at all times, unless expressly *prohibited*.

As the parties have the power, by suitable provisions, to establish such a legal relationship as to make inapplicable certain rules of the internal law, there seems to be no good reason why it cannot be altogether shut out by adopting some system of foreign law as a whole.

2. To my mind Gierke ("*Deutsches Privatrecht*," i, p. 216) gives us the correct theory in that he says:—

"Unless otherwise provided by a coercive law, the parties may agree as to what system of law shall be authoritative. They may therefore expressly or impliedly subject themselves to a system of law different from that otherwise governing the legal relationship in question."

And on p. 231:—

"The law expressly or impliedly chosen by the parties will, in the first instance, govern the effects of obligations arising from legal transactions."

The rule as thus expressed was taken up by both preliminary drafts for the *German Civil Code* (§ 34), even so far as to permit a voluntary subjection to a dead system of law, but the Introductory Act did not adopt these provisions, preferring to leave the question to practice. The German courts have repeatedly recognized the doctrine (Imp. Ct., xx, p. 335; xxiv, p. 113).

3. The principle has received sanction in *Italian* legislation. Art. 9 (end) of the *Disposizioni* provides with regard to contracts: "*e salva in ogni caso la dimostrazione di una diversa volontà*" (= provided that in each case a different intention may be proved).

It has also expressly been enacted into the Codes of Private Law of some of the Swiss cantons, *e.g.* Zurich, §§ 5, 7; Zug, § 4; Schaffhausen, § 5. Although these codes have been superseded by federal law in regard to contracts, the practice of the Federal Court is to the same effect (*A. E.* xvi, p. 795; xxii, p. 483).

4. Of course a subjection to a particular system of law is not, as a rule, to be found in practice, except in large and important transactions of an international character. Provisions to this effect

become useful in the establishment of large commercial institutions, such as exchanges, banks, and railroads, although it is indeed advisable to employ them generally in drawing contracts. A so-called "*election de domicile*" is not sufficient.

5. The parties may also subject certain particular questions only, to a special system of private law, leaving the other matters at issue to be solved by the general rules of International Private Law.

[The main rule has been recognized by a recent case in England in regard to marriage contracts. "As a general rule, the law of the matrimonial domicile is applicable to a contract in consideration of marriage. But this is not an absolute rule. *It yields to an express stipulation that some other law shall apply*" (*In re Fitzgerald*, Ct. of App., 1904, 90 L. T., Rep. 266). — *Trans.*]

III. *The intention to subject a transaction to a particular system of law may be either express or implied.*

1. The obligation to abide by a certain domicile, and the voluntary subjection to a particular forum, are neither of them a basis for the application of the substantive law of that place.

2. The Swiss Federal Court takes a contrary view (*A. E.* xix, 862). It also deduces from the venue of negotiable paper, not only a designation of the forum, but also the subjection of the parties to the particular law of bills prevailing at that place (see § 190, *infra*).

3. Provisions denoting a particular place of performance are not, as a rule, to be interpreted as indicating a voluntary subjection to the objective law of that place. Three cases are often met with in practice:—

- (a) The contract itself may provide, "to be performed at Berlin."
- (b) The provision may be found in an invoice subsequent to the contract; or in all the invoices of a firm. This would be only a unilateral completion of the terms of the contract not binding on the other party. Mercantile custom does not even require the party to object (see *Zeitschrift für internat. Privat- und Strafrecht*, ix, pp. 162–164). Furthermore, such provisions are frequently printed in small type, easily overlooked or misunderstood.
- (c) It may be found printed as part of a letter-head.

It might be noted in all these cases that the terms of the clause itself does not indicate a reference to any particular system of law.

Whether an agreement as to the *forum* can be deduced from it, is a question which concerns International Procedure.

IV. *The autonomy of the parties in choosing a law (e.g. a dead system) can, of course, be limited by legislation.*

The Belgian Committee on the Laws, in proposing a new civil code (Art. 7), limits the election, peculiarly enough, to:—

1. the *lex patriæ*;
2. the *lex loci contractus*;
3. the *lex executionis*.

V. *In the Orient the subjection to a European system is permitted.*

1. French subjects in the Indies may subject themselves to French law (*Journal de dr. i.*, xvi, p. 665).

2. According to the colonial law of the Dutch Indies, even the natives may subject themselves to Dutch European private law in certain matters.

VI. *Subjection by contract to a foreign system of law does not avoid the domestic tax laws (e.g. stamp duties and fees).*

These are provisions of public law which cannot be affected by private contract.

NOTES

1. Subjection by contract to any other law than that which is really applicable will be nugatory in some cases, *e.g.* in regard to the effects of marriage, guardianship, marital authority.

2. The question whether or not foreign law may or must be considered by the court *ex officio* is dependent upon the *lex fori*.

3. In the text-books and in the practice of the courts a voluntary subjection of the parties to a particular system of law is frequently spoken of in argument, where, in truth and fact, the will of the parties intended no such effect.

§ 55. Form in Relation to International Transactions.

Hartogh, *De regula juris: locus regit actum* (The Hague, 1838).

Duguitt, *Des conflits de législations relatifs à la forme des actes civils* (Paris, 1882).

Lainé, ii, pp. 328–428.

Boissarie, *De la notion de l'ordre public en droit international* (Paris, 1888).

A. Mankiewicz, *Über die Bedeutung des Satzes locus r. a.* (Breslau, 1881).

Despagne, "La règle locus regit actum et l'ordre public," in *Revue pratique d. d. i. pr.*, i, part 2, pp. 52–66.

René de Bévotte, *De la règle "locus regit actum"* (Paris, 1895).

G. C. Buzzati, *L'autorità delle leggi straniere relative alla forma degli atti civili* (1894).

Fedozzi, *Journal de dr. i.*, xiv, pp. 69, 495.

I. *In the course of history, a rule has been developed applicable to the form of legal transactions. It may be expressed in the following terms:—*

The observance of that form is sufficient which is provided by law at the place where the transaction was entered into. However, that form may also be employed which is provided by the substantive law to which the transaction is subject.

For the sake of brevity, the doctrine is expressed by the words "*locus regit actum.*"

1. This rule of law which, in the tenor given to it in the Latin, says much more than the rule is intended to imply, refers solely to the *form* of a transaction, and not to the competency of the parties, or to the substance of it.

The form is the dress of a transaction, and being a part of it, should be subject to the same law as the transaction itself. However, for *practical* reasons, it was found impossible to restrict it to this law, and, therefore, the observance of the form prevailing at the wholly casual place at which an instrument has been drawn will, as a rule, suffice. It is not a question of the domicile, but of the mere momentary sojourn.

The separation of the form from the substance of a legal transaction was early recognized as necessary, as was also the fact that a certain elasticity should be permissible in regard to forms. A distinction was made between:—

(a) *Solemnia intrinseca*, intrinsic formalities, or "*ea quæ insunt in ipsa forma cujusque actus, neque separari ab ea possunt.*" These formalities are also called *substantialia*, as they are involved in the substance. Boullenois, i, p. 498, speaks of "*formalités substantielles que j'appellerai encore intrinsèques et viscérales*" (*quæ forma destructa jam contractus vita defunctus est*).

The Spanish Civil Code, Art. 10, speaks of "*validez intrínseca*," and the treaty upon succession projected at the International Conference at The Hague (1900) uses the expressions, "*la validité intrinsèque des dispositions testamentaires ou des donations à cause de mort*" (Art. 1) and "*comme condition substantielle*" (Art. 2) in connection with certain prescribed formalities.

(b) *Solemnia extrinseca*, intrinsic formalities, or "*ea quæ actui per se formam habenti et ultra conventionem contrahentium sed ad ipsam conventionem roborandam extrinsecus accedunt.*"

The Italian *Disposizioni* still use the term "*forme estrinseche*" (Art. 9).

2. The reasons for the rule are various. But it results logically from the fact that the territory for international transactions is not limited to any one state, but reaches over the whole earth. Therefore, wherever international intercourse is permissible and possible, the form of the transaction should be permitted to follow the law of the place at which the parties meet, even though accidental. Any other limitation would unnecessarily hinder international commerce, although, on the other hand, it cannot be denied that the *complete* cleavage of a transaction from its form may be accompanied with undesirable results.

Formerly the rule was explained by implying a voluntary subjection by the parties. Compare P. Voet, "*De statutis*," *sectio* ix, c. ii, No. 9: "*Quia censetur quis semet contrahendo legibus istius loci ubi contrahit etiam ratione solemnium subijcere voluisse.*" To-day the rule has been based upon the theory of universal custom (v. Bar, i, p. 340).

3. The form of a transaction implies only that which the parties themselves can do in order to express their will in the manner provided by law. Anything which goes farther, *e.g.* the requirement of a governmental ratification, is a substantial requisite upon the same level as the effect of substantive provisions made by contracting parties (v. Bar, i, p. 349). In this connection we may cite the institution of adoption, which, in many Jurisdictions, is made to depend for its validity upon governmental ratification. This requisite may be designated partly as a form, and partly as substantial.

4. The rule refers to transactions in the law of persons, the family, obligations, and succession. Art. 11 of the German Introductory Act provides:—

"The form of a legal transaction is governed by the laws which are authoritative for the legal relationship to be created thereby. However, the observance of the law of the place at which the transaction is undertaken will be deemed sufficient."

Art. 8 of the Japanese Statute (*Ho-rei*) upon the Application of the Laws in General is virtually to the same effect.

5. Art. 24 of Swiss *N. & A.* is still more lenient, as it permits the form of testamentary dispositions, contracts for succession, and gifts *causa mortis* to follow the law of the place of executing the instrument, of the domicile of the decessant at the time of death,

or of the home canton (nationality) of the deceased. In other respects, the usual principles prevail.

II. *The rule is frequently referred to in legislation and practice as though it was imperative in character, but in general it is permissive only.*

1. It may be interesting to note how the early authors expressed the rule.

Bartolus (No. 32) says : —

"In solemnitatibus semper inspicimus locum, ubi res agitur . . . tam circa contractus quam circa ultimas voluntates."

Molinæus makes the point of his discussion the following : —

"Aut statutum loquitur de his, quæ concernunt nudam ordinationem vel solemnitatem actus, et semper inspicitur statutum vel consuetudo loci, ubi actus celebratur sive in contractibus sive in iudiciis sive in testamentis sive in instrumentis aut aliis conficiendis. Ita quod testamentum factum coram duobus testibus in locis, ubi non requiritur maior solemnitas, valet ubique. Idem in omni alio actu."

Barilis (*"De potestate legis municipalis Lugd. Bat.,"* 1641, p. 70) : —

"Contractus semper sequitur consuetudines et statuta loci, in quo celebratur."

Burgundus : —

"In omnibus quæ ad formam instrumenti pertinent, spectanda est consuetudo regionis ubi fit negotiatio."

2. The rule is expressed imperatively, *i.e.* so as to make the observance of the forms at the place of execution obligatory, in the following codes : —

- (a) of Spain, Art. 11 (see Art. 732) ;
- (b) of Portugal, Art. 24 ;
- (c) of Mexico, Art. 14 ;
- (d) of Louisiana, Art. 10, which was drawn from the project of the French Convention of 1793 ;
- (e) Bavarian Court Rules of 1816 ;
- (f) Netherlands Statute of 1829, Art. 10, with which Art. 18 of the Dutch Indies corresponds ;
- (g) in part, in the *Disposizioni* of the Italian Code, Art. 9.

3. The tendency of modern jurisprudence is to construe the rule as permissive and *not* obligatory. Its purpose is to facilitate

and not to impede intercourse (Savigny, "*System*," viii, p. 358; von Bar, "*Lehrb.*" p. 123; Regelsberger, "*Pandekten*," i, p. 170; Gierke, *D. Priv. R.*, i, p. 231; see also statutes cited at I, 4 and 5, *supra*).

III. *The rule does not apply to all transactions.*

It has been said that the rule applies only when the observance of other forms is impossible (von Wyss, "*Z. für schw. R.*," ii, 97); also that the rule does not apply to ceremonial forms (Laurent). No such distinctions can be made. It must, however, be recognized that it does not apply to all transactions. It is limited by the following propositions:—

1. That the form for the loss and acquisition of *property* rights in immovables is governed by their location. This results historically from the fact that in disputes concerning free jurisdiction over land, the law of its location was always considered alone competent. The rule has been lately re-established by Art. 11, of the German Introductory Act:—

"The provision contained in sentence 2 of the first paragraph of this article [see *supra*] does not apply to transactions creating a right to a thing, or which deal with such a right."

2. That the internal state may and sometimes does (*e.g.* Russia) provide certain marriage ceremonies, which must be observed by its subjects, even though the marriage takes place abroad.

3. That the internal laws, especially in regard to wills, may prescribe that the internal forms be binding upon its subjects even for transactions completed abroad. Of course such provisions might be denoted as anti-international. They are, nevertheless, to be respected. But those provisions of the internal law are reasonable which require the co-operation of officials of that state in order to insure validity.

Certain legal acts are wrapped up in absolute forms prevailing at the place of domicile of the parties performing them, even though the acts be performed at a different place. An example is furnished by the *professio juris* permitted by Art. 22, *N. and A.* (see § 134, *infra*).

IV. *An exception to the rule is presented whenever a statute expressly regards a transaction entered into abroad as fraudulent, if not in accordance with the formalities prescribed by the local law.*

Refer to § 5, *supra*.

V. *The permissive character of the rule does not apply to transactions entered into in consular jurisdictions, for there, even as to formal matters, the national law is authoritative.*

See § 27 of the German Statute of 1900 upon Consular Jurisdiction.

VI. *The form of wills requires separate consideration.* See § 147, *infra*.

VII. *The significance of forms in the law of bills and notes is also to be specially considered.* See § 191, *infra*.

In America and England

The rules of law applicable to formal requisites in connection with particular legal relations such as marriage, divorce, obligation by bill or note, will receive consideration under the proper headings. In general, however, it may be said that the rule of "*locus regit actum*" is accepted with regard to *movables* in these Jurisdictions, though the optional or permissive character of the rule is not always recognized. The rule is considered permissive in regard to wills of personal property and, under certain circumstances, to marriage ceremonies (*q.v.*), but with regard to contracts generally, it is held in England that the observance of the law of the place where they are made is not only sufficient, but also *necessary* to constitute validity as to external form (*Bristow v. Sequeville*, 19 L. J. Ex. 289; *Trimbley v. Vignier*, 1 Bing. N. Cas. 151; *Westlake*, "Private Int. Law," 3d ed. pp. 249, 251). This doctrine was carried over to America upon the authority of Judge Story, who says (§ 260) "that formalities which are required by the *lex loci* are indispensable to their validity elsewhere" (see *Pritchard v. Norton*, 106 U.S. 124, 130; *Miller v. Wilson*, 146 Ill. 523). More recent authorities are inclined to adopt the distinction pointed out by the author, between formalities which are facultative, *i.e.* prescribed merely for the purpose of facilitating solemnization, and those which are by law necessary to the validity of the act (*Wharton*, § 679; *Vraner v. Ross*, 98 Mass. 591).

It is generally accepted that the provisions of the Statute of Frauds do not refer to formalities essential to the validity of contracts, but as to the nature of the evidence which will be received to prove them. Therefore, where the statute provides that no action

shall be maintained unless the contract be in writing, the *lex fori* is absolute and applies to a foreign contract entered into by parol according to the law of the place of its solemnization (*Leroux v. Brown*, 12 C. B. 801; *Gibson v. Holland*, L. R. 1 C. P. 1; *Wilcox Co. v. Green*, 72 N.Y. 18; *Da Costa v. Davis*, 24 N.J. L. 319). It is said, "the *form* of the contract is regulated by the law of the place of its celebration, and the *evidence* of it by that of the forum" (*Pritchard v. Norton*, 106 U.S. 124, 134). This should therefore apply regardless of where the contract is to be performed. So *Hunt v. Jones*, 12 R.I. 265; but *contra*, *Wilson v. Lewiston Mill Co.*, 74 Hun 612.

Where the Statute of Frauds prevailing at the place of celebrating the contract provides that the contract shall be *absolutely void* unless in writing, the question is one of essential validity and the rule of "*locus regit actum*" applies (*Miller v. Wilson*, 146 Ill. 523; *Hausman v. Nye*, 62 Ind. 485).

The formal validity of transactions having reference to rights in immovables is governed by the *lex situs* (*Brine v. Ins. Co.*, 96 U.S. 627, 637; *Genet v. President, etc.*, 13 Misc. N.Y. 409; *Adams v. Clutterbuck*, 10 Q. B. D. 403; *In re Hernando*, 27 Ch. D. 284).

The Canadian Civil Code, Art. 7, which enacts the rule of "*locus regit actum*," has been held by the Supreme Court to be permissive only (*Ross v. Ross*, 25 S. C. R. 307).

NOTES

1. The proposed treaty between Peru, Argentine, Chile, Bolivia, Ecuador, Venezuela, Costa Rica (Lima, 1878), contains the following (Art. 5):—

"The form and external ceremonies of contracts or of any other legal instruments are governed by the law of the place of their execution."

Similarly the proposed treaty of Montevideo (1889) recommended by the International American Conference, which met at Washington, provides (Reps. of Int. Amer. Conf., p. 890):—

"The form of *public* documents shall be governed by the law of the place where they are executed."

A distinction, however, is made as to *private* documents in that Art. 39 continues:—

"Private documents shall be governed by the law of the place of performance of the contract in question."

2. At the first International Conference of The Hague (1893) I opposed the adoption of the principle of "*locus regit actum*" as a general international rule. I claimed that it was necessary to establish its application in detail throughout the whole field of International Private Law (*Actes*, 1893, p. 53).

3. The correction proposed by G. Cohn (*"Das neue deutsche bürgerl. R."*, p. 196), viz. to use the term "*locus regit formam actus*," is no definite improvement, as it does not express the permissive character of the rule.

§ 56. Limitation of Actions in Private Law.

Mittermaier, *Civ. Archiv*, xiii, p. 307.

v. Bar, ii, p. 92 *et seq.*

Wharton, *Conflict of Laws*, § 545.

Asser-Rivier, p. 85.

Flandin, in *Journal de dr. i.*, viii, pp. 67-81, 230-236.

B. E. Asscher, *De verjaaring in het internationaal privaatrecht* (Amsterdam, 1881), p. 56.

1. *The limitation of a right of action is governed by the law to which the issue is subject. Limitation or outlawry is an institution of substantive private law, and the question whether an action is barred is, upon principle, regularly dependent upon the concrete and subjective system of private law under which the right arose.*

Views upon this question vary greatly.

1. The *lex fori* is considered authoritative wherever limitation is considered an institute of *procedure*. The Dutch School still makes its influence felt in this connection.

P. Voet (*"De statutis*," section x, chapter 1, No. 1) says:—

"quia actor sequitur forum rei, ideo extraneus petens a reo quod sibi debetur, sequetur terminum statuti præscriptum actioni in foro rei."

U. Huber (*"De conflictu legum*," No. 7):—

"Ratio hæc est, quod præscriptio et executio non pertinent ad valorem contractus sed ad tempus et modum actionis instituendæ, quæ per se quasi contractum separatimque negotium constituit. . . ."

The theory as thus laid down by the Dutch authors reigns almost uncontested in the practice of English and American courts. Compare Story, § 576 *et seq.*, and Wharton, "*Conflict of Laws*," 2d ed., §§ 534-545. In closing, the latter author remarks (§ 545) that elsewhere, especially in Germany, limitation is not looked upon as an accessory to procedure, and adds: "It is held by Savigny, following in this respect Wächter, Schäffner, and Hertius, that the local law of the obligation itself, and not that of the place where the suit is brought, is to obtain. But however worthy these opinions may be of consideration, they *cannot now*

affect the conclusion of our courts, that, as to the statute of limitations, *the lex fori must prevail*. The rule is now too firmly settled to be shaken." In accordance with this view is also Kent's "Commentaries upon American Law," ii, pp. 462, 626, and Dicey, p. 21. It seems to me, however, that it is the duty of jurisprudence in those countries to maintain that this proposition, founded upon a false doctrine of the Dutch School, ought not to be adhered to any longer.

2. Another view at variance with the rule as above stated consists in regarding the *lex domicilii* of the debtor as authoritative.

If we refer to the *lex domicilii* of the debtor in order to find if the action is barred, the question arises as to what will result when the debtor changes his domicile. Von Bar claims that the debtor may rely on the statute of limitations of his former or his latter residence, according to whichever is more favorable; the statute would begin to run only from the date of acquiring a new residence ("*Lehrbuch*," pp. 120-121). It seems to me this would eventually refer the question to the former residence, and the view, generally, is incorrect. The principle of limitation is dependent upon the nature of each separate right, and whether or not the right can be barred, is part of its own subjective nature. Therefore it cannot be referred to the domicile of the debtor, whether former or later, except of course in cases where the issue itself is substantively controlled by the law of the domicile.

This does not change the fact that by certain legal processes, the character of a right to be barred or not to be barred may, under certain circumstances, be subject to change. Thus a right through testamentary succession may, by novation, be changed to a personal right, a personal right may, by foreclosure, become a real one. But the character of being barred or not being barred does not fasten itself upon a subjective right in private law dynamically from the outside. It resides *within* the right itself.

3. A third view makes the *lex loci contractus* authoritative. But this is not correct unless the issue is determined substantively according to this law. The formula refers only to issues growing out of contracts.

4. If we accept the correct principle, a practical consequence is that the system of private law determining whether an action will be barred is different for each of the following cases, viz. : —

- (a) for property rights,
- (b) for contractual obligations,
- (c) for obligations in tort,
- (d) for claims in succession,
 - (aa) claims of legatees and devisees (in general),
 - (bb) claims of legatees partaking of the nature of rights in property (e.g. to the enjoyment of a piece of land).

It is wholly immaterial whether the statute of limitations is contained in a code of substantive law or of procedure. It is also legally immaterial that the law or practice of the place under which the right was created conceives the limitation of actions as part of the law of procedure, and thus applies exclusively the *lex fori*—such a conception is not binding upon the courts of another state.

5. Continental practice is in accordance with the principle as above stated.

- (a) For France, see the case reported in *Journal de dr. i.*, viii, pp. 230–236.
- (b) The principle is especially well established by the practice of the German courts (Sup. Ct. of Commerce, xiv, p. 258; Imperial Ct., i, p. 126; vi, p. 25; ix, p. 225).
- (c) The principle is followed also in Russia (Tribunal of Commerce, Moscow, 1877, *Bloumberg v. Wahlberg*, *Journal de dr. i.*, viii, p. 189).
- (d) The Swiss Fed. Ct. has also held (*A. E.*, xii, p. 83) that the limitation of actions is determined by that law to which the obligation in its essence and effect is subject. This it deduces from Art. 153, No. 6, Code of Oblig., which provides:—

“The statute does not begin to run and ceases in case it should already have begun . . . (b) provided a claim would be recognized before a Swiss Court.”

Another decision states the principle clearly as follows (*H. E.*, xi, 198):—

“The certainty of the law as between the parties is without doubt better subserved if the question of limitation is fixed once for all when a right originates (e.g. the obligation) than if the privilege is given to the debtor to affect the period of limitation by a favorable selection made in changing his domicile.”

II. *The interruption and cessation of the running of the statute are governed by the same principles.*

III. *As to the rules applicable to negotiable instruments, see § 198, infra.*

In America and England

It is manifest that the divergence between the doctrine supported upon the Continent of Europe, and that followed in America and England, results from the difference in the interpretation given to statutes of limitation. In the former jurisdictions they are interpreted as affecting the right, in the latter the remedy only. Whether or not the interpretation given them in America and England is right or wrong, whether it be not a play upon words to speak of them as laws of procedure when the *whole* remedy is taken away, and therefore the whole *right* so far as a court of law will take cognizance of it, it is now too late to discuss as a practical matter in these jurisdictions. It has often been said that were the matter *res integra*, our courts might hesitate to adopt the rule (Dicey, p. 21).

Where the intention of the statute is clearly expressed as going to the extinguishment of the right or debt, the court should clearly follow the rule of the Continent. It has been held that in such a case, where the obligor is domiciled in the foreign country to which the debt was subject during the whole period of the statute, the action will be barred, even before the courts of a country having a longer period for the statute (Story, § 582; *Brown v. Parker*, 28 Wis. 21; *Rucks v. Taylor*, 47 Miss. 191; *Eastwood v. Kennedy*, 44 Md. 563; *Walsh v. Mayer*, 111 U.S., 31). This was formerly the law also in England (*Huber v. Steiner*, 3 Bing. N. C. 202), but has been repudiated by the later decisions (*Westlake*, p. 279, and cases there cited).

Besides the restriction thus placed in America upon the extreme English doctrine, there is also a further tendency to approach nearer to the Continental view, in order to obviate by statute the injustice of permitting a suit to be brought against the debtor in the local jurisdiction, after the debt has been barred in the jurisdiction where it arose. The New York statute went into effect September 1, 1902 (applied in *Holmes v. Hengen*, 1903, 85 N.Y. Supp. 35). It is contained in § 390, *a*, Code of Civil Procedure, and provides:—

“Where a cause of action arises outside of this state, an action cannot be brought in a court of this state, to enforce said cause of action, after the expiration of the time limited by the laws of the

state or country where the cause of action arose, for bringing an action upon said cause of action, except where the cause of action originally accrued in favor of a resident of this state."

It has been decided in England and America that the restrictions imposed by the *lex fori* apply to a suit brought on a foreign judgment (*McElmoyle v. Cohen*, 13 Peters 312; *Loveland v. Davidson*, 3 Pa. L. J. R. 377; *Don v. Lippman*, 5 Cl. & F. 1).

NOTES

1. It is interesting to note the provisions of the Montevideo project (Reps. of Int. American Conf., p. 892):—

"Art. 51. Absolute limitations of personal actions shall be governed by the law to which the obligations involved are subject.

"Art. 52. Absolute limitations of real actions shall be governed by the law of the locality of the property subject to the lien."

The wrong theory has been supported in a dissertation by André Mercier "*De la prescription libératoire en droit international privé*" (Lausanne, 1897) He makes the following distinctions:—

(a) *des délais de déchéance*. These go to the essence of the right, and therefore the *lex contractus* must be authoritative.

(b) *des délais de prescription*. These refer to the exercise of the right, and therefore the *lex fori* is applicable. The author speaks of (pp. 133-135) the "*supériorité théorique et pratique du système de la lex fori*."

These views are opposed by W. Müller, "*Die Klageverjährung im int. Privatrecht*" (1898), and in *Bulletin de législ. comparée*, 1898, xxix, p. 466. In fact it is all very easy to say that the *lex fori* is applicable if difficulties present themselves and the matter is not a simple one, "*On pourrait répondre que si l'on refusait d'accepter une solution parcequ'elle n'est pas simple, on ferait aussi bien de biffer le droit international privé de la liste des études juridiques*" (p. 466).

Peculiarly enough, the view is still supported that the statute of limitations belongs to the class of laws having a coercive nature. Endemann, "*Lehrb.*," 8th ed., i, p. 92, note 28.

3. The following is contained in Kent, "*Commentaries on American Law*" (12 ed., Holmes, ii, p. 462, p. 626): "Upon the principle that the time of limitation of actions is governed by the *lex fori*, a plea of the statute of limitations of the state where the contract is made is no bar to a suit brought in a foreign court to enforce the contract; though a plea of the statute of the state where the suit is brought is a valid bar, even though brought upon a foreign judgment, provided the time of the residence of the party brings him within the time prescribed by the statute. . . . *The statute of limitations of the state in whose courts a suit is prosecuted must prevail in all actions.*" See also Dicey, p. 21, "It is now settled by a series of decisions that the question whether an action on a contract is barred by a statute of limitation must, in an English court, be determined wholly by reference to the *lex fori*, i.e. the ordinary or territorial law of England."

LAW OF PERSONS

§ 57. The Capacity to have Rights and the Capacity to act of Natural Persons in General.

P. de Paepé, "*De la loi applicable à l'état, à la capacité et aux meubles des étrangers*," in *Revue de dr. i.*, 2d ser., ii, p. 378.

I. *The capacity to have rights is to be distinguished from the capacity to act.*

1. When a *human being* has the *capacity to have rights*, he is regarded as a *person* (whether freeman or slave) before the law. This capacity is determinable exclusively by the law of the sojourn (*forum*); for even if slavery, bond-service, or civil death be institutions of the national or domiciliary state, they cannot be recognized where they exist neither in fact nor in law.

2. *Capacity to act* or *the status* is that independent power contained within the quality of a person to undertake particular transactions of a private legal nature, or it is "the legal position of a party in or with regard to the rest of a community." Capacity in private law is to be distinguished from political or public capacity. They are differently dealt with by legislation and practice.

II. *The following questions are embraced within capacity to act or the status:—*

1. whether a person possess those peculiarly *personal* requisites made necessary by law in order to transact business of a private legal nature;

2. whether a person has or has not been born in lawful wedlock; if not, whether he has been legitimated;

3. whether a person be under guardianship;

4. whether a person (woman) be under a disability of marriage;

5. whether a person possess capacity to marry (this question, for obvious reasons, is usually regulated separately);

6. whether a person's capacity to act has been limited by a

penal sentence, provided such a disability be recognized at all in the local state.

Besides separating from the conception of status, the conception of political citizenship, and the capacity to represent others before court, we must also separate all those substantive requisites which the laws provide for the origin, modification, or dissolution of legal relationships. In this latter category belong those substantive provisions according to which adoption or legitimation takes place, by which things (movable or immovable) are acquired, alienated, or donated, or by which a person is permitted to inherit. It is confusing, at least from the international point of view, to conceive of provisions in this direction as affecting the "capacity" of an individual and to speak of the capacity to be adopted, to be made legitimate, to receive a gift, to inherit, and the like, when denoting the objective and substantive requisites for these processes. The preliminary question everywhere in private law is: Can a certain person undertake transactions with binding effect, or is he, in whole or in part, incompetent? But when once this question is settled, we then have to do with requisites of general substantive law, which, especially in international law, must be dealt with separately.

If this course were not followed, all the subjective rights of an individual could finally be denoted as "*jura status*." And it might result, almost unnoticed, that all questions in international life were referred to the same law as that determining the status. An earnest warning must be registered against this misconception.

Whether testamentary capacity falls within the conception of status is disputable. We will discuss it in the law of succession. It is usually separately regulated by statute. Here the following is to be noted: If we limit the conception of status to contractual capacity (*capacité de contracter*), then of course testamentary capacity is not included. Von Bar specifically extracts the capacity to make a will from transactual capacity. He remarks that both testamentary and intestate succession might take place at the same time to the same estate, if a different system of law were applicable to intestate succession than to testamentary capacity (v. Bar. ii, p. 319). It has further been said that transactual capacity must be limited in its scope to undertakings between living persons (v. Bar, i, pp. 388-389); personality ends with death; the testator does not,

strictly speaking, deal with his possessions, and can only cause the effect, by the declaration of his will, that another person may acquire or not acquire a group of possessions, and undertake or not undertake a group of liabilities.

III. *The capacity to commit a civil tort is theoretically also a question of status, as is the capacity to commit a crime. This proposition is not yet recognized in practice.*

1. Capacity in tort is properly to be separated from substantive rules (upon requisites and effects) governing the particular act. It does not necessarily coincide with capacity to act in general. In practice civil torts are referred to the law under which they occur; this law is held also to govern the question of capacity. It is not the proper rule on principle (see A. Rolin, "*Le statut personnel en matière de droit pénal*," in *Revue de dr. i., N. S.*, i, pp. 43 et seq.).

IV. *The determination of the system of law governing the status is most important in international matters.*

This is especially true because:—

1. the age of majority has been differently regulated in different states (cf. Meili, "*Institutionen der vergleichenden Rechtswissenschaft*," pp. 109–110);
2. there are material differences in the other questions of status;
3. for individual reasons, exceptions may be recognized in particular cases.

It is easily understood why jurisprudence has tried for a long time to establish a "*status uniformis*" for cosmic intercourse. This was attempted, peculiarly enough, by the Dutch School.

Burgundus ("*Ad consuetudines Flandriæ tractatus*," i, No. 8):—

"... qui inhabilis est in uno loco, etiam in alio censetur inhabilis, quod utique accipiendum est de habilitate vel inhabilitate, quæ a statuto personali procedit et ad actus personales dirigitur."

Stockmans (Dec. 125, No. 8, p. 263):—

"Statuta in personas directa, quæque certam iis qualitatem affigunt, transeunt quidem cum personis extra territorium statuentium, ut persona ubique sit uniformis ejusque unus status."

Ulric Huber expresses himself as follows in "*Prælectiones*," pars ii, liber i, tit. iii, No. 12:—

"Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure, quo tales personæ alibi gaudent vel subjecti sunt, fruuntur et subjiciantur. Hinc qui apud nos in tutela curave sunt, ut adolescentes, filiifamilias, prodigi, mulieres nuptæ, ubique pro personis curæ subjectis habentur, et jure, quod cura singulis in locis tribuit, utuntur et fruuntur. Hinc qui in Frisia veniam ætatis impetravit, in Hollandia contrahens ibi non restituitur in integrum. Qui prodigus hic est declaratus, alibi contrahens valide non obligatur, neque convenitur."

The uniformity of status is referred in theory to *Lex 19 R. J.* 50, 17, "*Qui cum alio contrahit vel est debet esse non ignarus conditionis ejus.*" The effect of this is that any one contracting with another must know his legal position or must ascertain it. The same view was maintained also by the Speculator and by de Rosate. We shall see that a "*status uniformis*" may work much hardship if adhered to without limitation, especially in regard to commercial relationships.

V. *A penal sentence may greatly limit capacity to act in some countries.*

Upon principle, a foreign penal sentence may affect the private legal status of a person, although the authorities frequently say that a criminal judgment can have no extra-territorial effect. Civil disabilities resulting from a foreign penal sentence should be recognized internationally. There is really no distinction between a limitation of capacity enacted directly in a foreign law and that declared by a foreign court. A distinction might be made between :

1. interdictions accompanying a penal sentence declared *in the native state* upon the person whose status is under consideration ; and,
2. interdictions declared by a government *to which the particular person was not subject.*

Argentæus demanded this distinction in No. 13, and Burgundus ("*Ad consuetudines Flandriæ*") treats of it specially under the general heading, "*Utrum sententiæ excedant territorium.*" The author first discusses (in Nos. 1-10) the classification of sentences (*sententiæ reales, personales, and mixtæ*), and then says at the end of No. 10, in regard to *sententiæ personales* : —

"Ceterum ex his sententiis quæ ad personas referuntur non una est qualitas ; aut enim de ea quæritur quæ personam obstringit ad

aliquid, et hæc magis accedit ad naturam obligationis; aut de ea (No. 11), quæ statum personæ turbat et hæc conditionem æmulatur statuti personalis. Sed quoniam omnis propositi nostri summa eo spectat, ut sciatur utrum suum sententiæ egrediatur territorium: excutiamus itaque naturam singularum; nam mihi quidem sola illa, quæ de statu personæ fertur, explicare vives extra territorii limites vivetur."

Burgundus holds that the infamy of a penal sentence accompanies the person everywhere, and, as it were, brands his status with a blemish (= No. 12). Boullenois also states that excommunication and civil death are of universal effect (*titre i, ch. ii, obs. iv*). There seems to be a difference of opinion among French jurists of the present day, as to whether a penal sentence will, or will not, work extra-territorially upon the status. To the effect that it will not is R. Garraud, "*Traité théorique et pratique de droit pénal français*," 2d ed., 1898, i, p. 324. *Contra*, A. Rolin, "*Le statut personnel en matière de droit pénal*," in *Revue de dr. i., N. S.*, i, pp. 43, 58; Weiss, "*Traité élémentaire de dr. int. privé*," 2d ed., pp. 435-436; Foelix, ii, p. 316, note a.

VI. *The significance of the question of status is better understood when we remember that the principles applicable to it apply throughout the whole domain of private law.*

An exception is constituted by English and American law, wherein the question of status is always dependent upon the character of the objects dealt with, or of the acts done by the person whose status is being considered.

It will be unnecessary to return again to questions of the status in discussing the detail, unless certain peculiarities must be mentioned.

VII. *The status is subjected by law and practice to a varying treatment in the different countries of the world.*

As a rule, whatever the principle adopted, it will apply to all the qualities combined in the status, that is to say, for the capacity to act of the following classes of persons, viz. :—

1. minors and adults ;
2. wards (this becomes of particular importance in regard to testamentary capacity ; there are also some laws giving wards the right to create charities (§ 40, Zurich Code of Private Law)) ;
3. persons under curatory ;
4. interdicted persons.

The capacity to act with regard to *certain* matters is usually regulated specially, so that the *general* principle which may have been adopted upon the capacity to act will not apply. Such cases are the following, viz. : —

1. capacity to marry ;
2. capacity to voluntarily recognize a child born out of wedlock ;
3. testamentary capacity. It is disputed whether testamentary capacity belongs at all to the capacity to act.

VIII. *There are certain limitations of the capacity to act, resulting from an execution (for debt) and dependent upon the same. Here the lex fori applies.*

For instance, in Swiss law : —

1. Art. 96, Fed. Statute, upon Prosecution of Debts and Bankruptcy provides : —

“The debtor is restrained under penalty from interfering in any manner with the property under execution, unless assented to by the levying officer. He shall be expressly notified of this by the officer.”

2. Art. 204 : —

“Acts done by the bankrupt after adjudication, with reference to the property belonging to the bankrupt estate, are void as against the creditors in bankruptcy.

“Provided, however, that if the bankrupt, before the publication of the adjudication, has paid a bill of exchange made by, or drawn against him, at maturity, the payment shall be valid in case the payee had no notice of the adjudication and could have had redress against third persons.”

3. Art. 298 : —

“The debtor is permitted to continue his business under surveillance of the receiver ; however, from the time of publishing the receivership, he cannot validly convey or incumber real estate, give pledges, enter into bail, or deal with his property without consideration.”

IX. *We will treat of testamentary capacity specially under the law of succession (infra, § 144).*

§ 58. The Regulation of the Status according to the Laws of the Principal Nations of the World.

1. *In states supporting the theory of national law (§ 44, supra),*

the status of the alien in the internal state, and of the native abroad, is controlled by the lex patriæ.

From this rule, it follows that if a person have capacity to act by the laws of his own country, he will have it everywhere, and if he be incapacitated, or limited in capacity there, he will be under the same disability everywhere else. Thus we might here speak of the "ubiquity" of the status; nor is it material whether the manifestations of the status take place in relations between aliens *inter se*, or between aliens and natives. In the words of Boullenois (ii, p. 95): "*L'homme capable par état porte cette capacité partout. L'homme incapable par état porte également cette incapacité d'état partout.*"

1. Italy

The rule as stated is unconditionally recognized by legislation in Italy, at least in regard to ordinary matters of private law. In the *Disposizioni*, or provisions upon the publication, interpretation, and application of the laws in general, which constitute an introduction to the Civil Code of 1865, the following provision is found (Art. 6):—

"Lo stato e la capacità delle persone ed i rapporti di famiglia sono regolati dalla legge della nazione a cui esse appartengono."

The status and capacity of persons and the relations of the family shall be regulated by the law of the nation to which the persons belong.

It is to be noted that the Italian lawmaker speaks bluntly of the status of the person. We may therefore say that the law embraces:—

- (a) the status of the alien domiciled (or sojourning) in Italy ;
- (b) the status of the Italian domiciled (or sojourning) abroad.

2. France

France supports the same principle. It is true, Art. 3, par. 3, of the Civil Code reads literally as follows:—

"Les lois concernant l'état et la capacité des personnes régissent les Français même résident en pays étrangers."

The laws concerning the status and capacity of persons are controlling upon Frenchmen even though residing in foreign countries.

Differing from the Italian *Disposizioni*, the French Civil Code speaks of *Frenchmen* abroad. Notwithstanding this, the rule is held in practice to mean that the status of aliens residing in France is also governed by the *lex patriæ*. Compare Laurent, "*Exposé critique des principes généraux en matière de status réels et personnels d'après le droit français*," in *Revue de dr. i.*, i, p. 244. The rule does not apply, however, to immovables. The status of a person in dealing with immovables is governed by the *lex rei sitæ*. Art. 3, par. 2, Civil Code, provides:—

"Immovables, including those possessed by aliens, shall be governed by French law."

There is another limitation of the principle for the benefit of French citizens. The courts have established the following proposition: Where a Frenchman contracts with an alien who, according to the law of his own country, has no capacity to act, the alien will nevertheless be treated as having such capacity, provided the Frenchman believed him to have it *without being guilty of negligence*. The main point here is that the Frenchman has been mistaken in regard to the age or other disability of the party. In the *Journal de dr. i.*, xxvi, pp. 364–367, a case is cited in which the following is said in regard to the status of an Italian woman:—

"In view of the fact that the alien resident in France is governed by his personal statute in regard to his capacity to act, it follows that the validity of the agreement and of the legal acquiescence thereto are determinable by Italian law, as it is established that X (the creditor) was neither deceived as to the age nor as to the nationality of the defendant."

3. *The Netherlands*

The statute of 1829 provides (Art. 6):—

"The statutes relating to the law of the status and the capacity of persons to act apply also to citizens of the Netherlands sojourning in a foreign country."

With this provision, the law of the *Dutch Indies* coincides (Art. 16). Conversely, the law of the Netherlands, through the practice of the courts, refers to the national law of aliens domiciled in the local state, in regard to their personal, family, and successory relationships. Here, as in France, immovables are excepted from the rule.

4. Portugal

The Civil Code provides in Art. 27:—

“The status and civil capacity of aliens are governed by the laws of their own country.”

II. *In those states which support the theory of domiciliary law (§ 43, supra), the status of the alien in the internal state and of the native subject abroad is controlled by the lex domicilii.*

From this it follows that whosoever has the capacity to act by the law of his momentary domicile has such capacity, no matter what the *lex patriæ* provides.

III. *There are certain systems of law in which it is declared that the status of aliens is, on principle, referable to the lex patriæ, although its determination in certain directions is dependent upon territorial rules.*

1. The German Empire

1. The general principle is here, indeed, the *lex patriæ*, as Art. 7 of the Introductory Act provides:—

“The capacity of a person to act is determined according to the law of the state to which the person belongs.”

2. But this principle is subject to two modifications; to wit:—

(a) By virtue of the following further provisions of Art. 7:—

“Where an alien undertakes a transaction in the inland, in regard to which he has no capacity to act, or for which his capacity is restricted, he shall, for such transaction, be considered as having full capacity, provided the German laws would so consider him. This shall, however, have no application to transactions within the law of the family or succession, or such as purport to deal with a foreign piece of land.”

In other words, transactions within the category of commercial or international intercourse, are subject to German law as a territorial rule.

(b) By virtue of Art. 27, Introductory Act, by which German law is made applicable if the law of the state to which the alien himself belongs, refers the question to that system of law (see *supra*, § 7, iii, 2). In that event the German (*i.e.* domiciliary) law applies even to such questions of the status as are not included within the territorial rule of Art. 7.

2. *Japan*

Practically the same principle as is established by Art. 7 of the German Introductory Act, just quoted, has been enacted by the Japanese statute of 1898 in Art. 3.

3. *Switzerland*

The basic principle of Swiss law relative to the status is also the *lex patriæ*, but the rule is considerably modified, as Art. 10 of the Federal Statute upon Personal Capacity (1881) contains a territorial rule applicable to transactions of commercial intercourse entered into upon Swiss soil between aliens and Swiss subjects. It provides:—

“1. The provisions of this act shall apply to all Swiss, whether residing at home or abroad.

“2. The capacity of persons to act is governed by the law of the state to which they belong.

“3. If, however, an alien, incapacitated to act by the law of his own country, enters into obligations in Switzerland, he shall be bound in so far as he would be considered competent according to Swiss law.”

The later statute of 1891 (which we refer to as *N. & A.*) expressly reserves the second and third paragraphs of Art. 10.

Art. 10 does not interfere with the application of such laws of a person's native state as do not enact restrictions based upon personal reasons inherent in the person himself (Message of Fed. Council, *Bundesb.*, 1879, iii, p. 69). This excludes such limitations of capacity as result from the existence of peculiar legal relationships. As examples of these may be cited limitations upon the power to deal with particular property, *e.g.* goods obtained by fraud, the disability of a married woman, the disability of the husband to interfere with rights of the wife. The message of the council points out that especially the latter limitations are results not of individual peculiarities, but of the marriage relation, and can be regulated only in organic co-operation with the entire law of marriage. Similar reasoning applies to limitations set upon the freedom of action of a bankrupt to deal with his property.

It follows, then, that by virtue of the limited territorial rule of Art. 10, an alien, after having entered into transactions in Switzerland, cannot rely upon disabilities such as the following:—

- (a) his minority according to national law, if he be major by Swiss law ;
- (b) the quality of being "son of the house" (*Senatus Consultum Macedonianum*) even though this be a good defence to a loan, according to the *lex patriæ*.

Nor can an alien unmarried woman or widow rely upon the disability of sex imposed by her national law—*contra*, an alien married woman, whose status (as we shall see) is referred to the *lex patriæ*.

On the other hand, Art. 10₃ does not apply to the status of aliens in regard to such matters as are not connected with commerce, such as questions relating to the family and succession. Upon these points Art. 8 (and 32), *N. & A.* must be referred to, while the capacity to marry is regulated by the Federal Statute upon Civil Status and Marriage.

Differing from the law of France, the Swiss rule is wholly independent of any proof that the party has been deceived as to the capacity of the alien or as to provisions of his national law, or that he was guilty of negligence or had reason to suspect that the alien was without capacity.

The *lex patriæ* will apply, however, in the following directions :—

1. To Swiss citizens abroad, so far as the foreign law does not make itself applicable (Art. 28, No. 2, *N. & A.*). As long as Art. 10, par. 1, was in force (it was superseded by Art. 34, *N. & A.*), Swiss courts were compelled to apply Swiss law upon the status to all obligations entered into by a Swiss abroad. Now, however, if the foreign law makes itself applicable, the validity of the transaction must be tested according to that law.

2. To aliens in Switzerland when the territorial rule of Art. 10, par. 3, does not work a change in the status.

3. To aliens entering into transactions in Switzerland with other aliens of the same or different state, no matter whether the transactions are or are not commercial in nature. There is no reasonable ground for extending the territoriality of the rule to relations between aliens themselves, as the statute merely intended to favor the Swiss and the course of trade with Swiss (see Schneider and Fick, "*Das schweiz. Obligationenrecht*," etc., p. 38, No. 4).

4. To such legal relations as are based upon correspondence

between aliens and Swiss. Compare to this effect also, Schneider and Fick, *supra*.

IV. *There are certain systems of law in which the status is treated purely territorially. See § 59, infra.*

V. *A tortious misrepresentation by a person to the effect that he has capacity to contract renders him liable for damages either in an amount equivalent to performance, or for the injury sustained by non-performance, according to the law of the place where the act occurs.*

1. In other words, the *lex delicti commissi* is applicable, even though in other matters the status is determined by the national or domiciliary law.

2. The principle is expressed in Art. 866 of the Austrian Civil Code, as follows:—

“Whoever artfully represents himself as having capacity to contract and thereby deceives another person not readily able to obtain the correct information, shall be liable for satisfaction.”

Art. 33 of the Swiss Code of Obligations provides:—

“If he [the party not bound] has led the other contracting party into a mistaken belief as to his capacity to contract, he shall be liable to him for the damage caused thereby.”

It will not require malice to make the party liable, but merely such conduct as represents a breach of the duty to deal fairly and honestly. On the other hand, mere silence as to the disability will not suffice.

§ 59. The Regulation of the Status according to American and English Law in Particular.

There is a great difference of opinion as to the standard to be adopted in these countries for the determination of personal law. The national law is, of course, rejected absolutely, but there is still a mighty struggle pending between the domiciliary and the territorial standards.

Westlake (“Private International Law,” 3d ed., p. 43) says:—

“§ 1. Whenever the operation of a personal law is admitted in England, the domicile of the person in question, and not his political nationality, is considered to determine such personal law.

“§ 2. When the capacity of a person to act in any given way is questioned on the ground of his age, it is perhaps still uncertain,

whether the solution of the question will be referred in England to a personal law."

Dicey lays down the following rule (No. 123, p. 477):—

"Any status existing under the law of a person's domicile is recognized by the court as regards all transactions taking place wholly within the country where he is domiciled."

Wharton also holds to the domiciliary standard with the following restrictions (§§ 84 *et seq.*):—

"... we are led to refuse extra-territorial operation to foreign laws so far as they impose on persons *marrying or doing business within our territory restrictions which we deem artificial and impolitic.*"

He says that "it is part of our public order and public morals that young men of twenty-one should be capable of making contracts that will bind them to others and bind others to them" (§ 8).

Dudley Field, on the other hand, supports the territorial doctrine absolutely, *i.e.* "the law of the place where the transaction is had" (§ 542, "Draft Outlines of an International Code"):—

"This is the American rule . . . on a review of many authorities; and it is submitted as the plain and reasonable rule, which will solve many vexed questions."

He sees no advantage in a uniform status and favors the territorial rule because "the inconvenience of a fluctuating rule is an inconvenience to the individual only, requiring him to ascertain and conform to the law of the place where he may be. It is the most convenient form for facilitating commercial transactions and the administration of justice" (i, p. 380).

The difference of opinion which this review of the authorities brings to light is merely a reflection of the decisions of the courts. It may be explained by the fact that the courts frequently state a rule in its broadest terms, when the rule happens to be applicable to the particular case in hand, and neglect to state the exceptions. Indeed, there are so many qualifications and exceptions in regard to the questions involved in the status that no absolute rule can be laid down. An English judge has defined the status to be "the legal position of a party in or with regard to the rest of a community" (Brett L.J. in *Niboyet v. Niboyet*, L. R. 4, P. D. 1, 11). It is clear from this definition that it will depend upon the *particular legal rela-*

tionship with which we are dealing, whether or not the "legal position" of a person will be determined by this or by that system of law. We will therefore refrain from discussing these questions except in connection with each particular legal relationship, as, for instance, of marriage, succession, etc.

As we have seen, most of the countries of Europe have laid down a general statutory rule applicable to the status of persons, which can be treated as the ordinary or normal rule upon that subject. In order that we may have a normal or general rule in mind also in connection with English and American cases, it may be noted that the highest courts of both Jurisdictions have declared in favor of the *law of the domicile*. The United States Supreme Court has said, "as a general rule . . . the law of the domicile governs the status of a person" (*Lamar v. Micou*, 112 U.S. 452). In the House of Lords, Lord Westbury has held that "the civil status is governed universally by one single principle—namely, that of domicile, which is the criterion established by law for the purpose of determining civil status" (*Udny v. Udny*, L. R. Sc. App. 441, at page 457).

§ 60. The Capacity to act of Minors and Adults.

1. *From the foregoing discussions upon status it follows that the powers of adults and minors are determined by various standards in the different countries.*

1. The *lex patriæ* is controlling wherever legislation or theory supports this principle generally. Majority will then be determined exclusively by the *lex patriæ* without regard to the domicile.

2. The *lex domicilii* is controlling wherever legislation or theory supports this principle generally. Majority will then be dependent exclusively upon the *lex domicilii* without regard to the *lex patriæ*.

3. Territorial law is controlling in England and the United States without considering the *lex patriæ* or the *lex domicilii*. Reasons for this view are (especially in the latter country) rules of public law and the interests of the minor himself. Wharton (§ 115) says that "to treat a foreigner of twenty-one, when in the United States, as a minor, because he is a minor in his own land, would not only be a fraud on all who deal with him in ignorance of the incapacity, but would inflict a cruel disability on himself."

4. The territorial law is controlling in regard to the relations of

commercial intercourse in Switzerland. Here the domestic law has cut away the "dangerous consequences" of the *lex patriæ* (Art. 10, Fed. Stat. Pers. Cap.).

5. A peculiar attitude is assumed by German law, based upon Arts 7 and 27, Introductory Act (see § 7, III, 2, *supra*). Especially with regard to majority and minority does the rule seem least to recommend itself when it gives the *lex patriæ* absolute control (compare also Dernburg, "*Das bürgerl. Recht des d. Reichs und Preussens*," i, § 36, p. 97). For example:—

- (a) An Argentinian of twenty-one and a half years of age (who reaches his majority at twenty-two), domiciled in Germany, would be considered in all respects a minor in Germany in respect of those relationships in which the *lex patriæ* is held to apply (Art. 7). But Argentine would consider the same Argentinian as a major because that state supports the theory of the *lex domicilii* in international matters. As Dernburg properly says (*supra*), *this legal result seems most bizarre*.
- (b) Again, a Dane of twenty-two and a half years of age (who reaches his majority at twenty-three), domiciled in Germany, would be considered a minor therein, while a Danish court, according to International Private Law as prevailing in Denmark, would apply the domiciliary law, *i.e.* of Germany, and consider him as major in respect of transactions entered into there (see Dernburg, *supra*).

II. *The status of majority, once acquired, is not altered through a fact occurring later, such as a change of nationality.*

The proposition laid down is "*semel major semper major*" (compare E. Spangenberg, "*Prakt. Erörterungen aus allen Teilen der Rechtsgelehrsamkeit*," 1837, ii, pp. 93-99). Jettel also well says ("*Handbuch des int. Priv. und Strafrechts*," p. 27) that majority once acquired is not lost, although the circumstance under which it arose has fallen away and although the person in question later became a citizen of a country, according to the laws of which he would not yet be of full age. It may be said, incidentally, that this is in accordance with modern theories of "intertemporal private law" (= upon retroactive effect). For instance, Swiss Fed. Stat. Pers. Cap. provides:—

"Persons who have attained capacity to act by virtue of cantonal laws at the time this act goes into effect, retain such capacity."

III. *The act of ratifying a transaction after reaching majority is governed by the same system of law which is authoritative for the transaction itself.*

In America and England

Notwithstanding the *general* rule as stated by the highest courts of these Jurisdictions (see § 59, *supra*) to the effect that the law of the domicile governs in matters of status, it is uniformly held in both countries that the question of majority and minority is one of national policy, and therefore the *lex loci actus*, *i.e.* the law of the country where the acts are done, the rights are acquired, or the contracts are made, will govern. Thus, though a person of twenty-two be domiciled at Vienna, where the age of majority is twenty-four (Art. 21, Civ. Code), he cannot escape liability on the ground of infancy in the United States or in England for a debt incurred in those jurisdictions. It is true that in many cases the *locus actus* is identical with the *locus domicilii*, but that the former is taken as authoritative, and not the latter, is shown by the fact that the converse case is equally true. In other words, if a person domiciled in the United States or in England, of the age of twenty-two, enter into a contract at Vienna, he will not be held liable upon it, because not of full age to contract at the place where the contract was entered into (*Thompson v. Ketcham*, 8 Johns. 189; *Bank of La. v. Williams*, 46 Miss. 624; *Gilbreath v. Bunce*, 65 Mo. 349; *Male v. Roberts*, 3 Esp. 163; *Cooper v. Cooper*, H. of L., 1888, Ct. of Sess. Rep., 4th Ser., xv, p. 21; *Parsons on Contracts*, vol. 3, p. 575).

To these two examples may be added a third, cited by Foote ("Priv. Int. Jur.," p. 261), whereby two Englishmen, transiently present in a country whose law regards them as infants, enter into a contract at that place. Although he says that "it would be difficult to think that a plea of infancy would be allowed to prevail," it would certainly be the only proper and logical conclusion from the rule laid down in the other two classes of cases.

It is well established that fraudulent representations made by an infant to induce another person to enter into legal relations with him will not give validity to the transaction itself (*Tyler on Infants*, pp. 53, 57).

§ 61. The Capacity to Act of Persons under Curatory for Prodigality.

v. Bar, i, pp. 425-428.

I. *According to the law prevailing on the Continent of Europe, the personal status established by the judicial decree is authoritative.*

1. The meaning of this is :—

- (a) that the person under curatory may rely upon the limitation placed on his capacity to act, under the jurisdiction of the *lex patriæ*, without giving consideration to the territorial or the domiciliary law ;
- (b) that in a country which supports the theory of the *lex domicilii*, he may rely upon his incapacity as established in his jurisdiction of domicile, even if he be sojourning at a place different than his domicile.

Persons under guardianship or interdiction by reason of prodigality are of course not possessed of a *natural* peculiarity which can be readily recognized in international intercourse, as in the case of minority or insanity, at least where these disabilities are patent. The view might be therefore supported that persons interdicted for prodigality may legally obligate themselves when out of the jurisdiction of interdiction ; regularly, however, the opposite is held. The prevailing opinion may be traced historically to Bartolus (No. 32), and Argentræus. The following arguments have been advanced against it :—

- (a) that interdiction for prodigality is in the nature of a police regulation, which must be limited in its operation to the territory in which the decree is pronounced ;
- (b) that as the interdiction rests upon a judgment, the same rules must apply as govern the execution of foreign judgments.

These reasons are not sound. Unless the limitation to the capacity to act arising from the interdiction be recognized internationally, the protective purpose sought to be accomplished quickly comes to naught. Again, the judgment of interdiction is not an adjudication upon a relationship of private law between individuals, but a protective decree in the interest of the person about to be placed under curatory.

French law does not contain provision for *public* guardianship for prodigality. It does not speak of "*tutelle*," but of "*interdic-*

tion" (Art. 489, *C. civ.*). The party may be interdicted solely upon the motion of his relatives (Art. 514, *C. civ.*) without need of the proceeding (*conseil judiciaire*) provided by Art. 513. A general incapacity to act does not follow from a "*conseil judiciaire*."

2. The main proposition as above stated applies also to Switzerland, notwithstanding Art. 10₃, Fed. Stat. Pers. Cap. (§ 58, III, 3, *supra*), as Art. 6 of this statute, requiring publication of the decree of guardianship as against third persons, is not applicable to foreign decrees (*A. E.* xiv, pp. 342-343). Again, the message of the Federal Council expressly states that the alien remains subject to the law of his own country respecting the status.

II. *Some countries do not recognize a personal status in this regard, e.g. the United States.*

Reference may be made to Wharton § 122: "A foreign decree of business incapacity based on the assumption that the party is a '*Verschwender*,' or spendthrift, is entitled to no extra-territorial effect."

In view of explanations already given, the adoption of this feudal doctrine is not surprising. [English cases accord: *Worms v. De Valdor*, 49 L. J. Ch. 261; *Atkinson v. Anderson*, 21 Ch. D. 100. *Trans.*]

III. *France has adopted a neutral doctrine.*

In France, a foreign decree of *guardianship* by reason of prodigality is recognized without publication; but an interdicted person may nevertheless make reasonable purchases in proportion to his means, without the assent of his guardian (*Journal de dr. i.*, xx, p. 860; xxii, p. 103).

§ 62. The Capacity to act of Insane Persons.

v. Bar, i, pp. 424-425.

I. *According to the Continental doctrine, a decree of guardianship on account of insanity made by the law of the personal status will be recognized everywhere.*

1. Upon principle, the incapacity of lunatics is a natural condition, and as such must be recognized all the world over. If, therefore, an insane person (a *furiosus*, a *mente captus*, or a *demens*) undertakes a transaction abroad, it will be considered void. The condition as such causes the incapacity to result *ipso jure*, without the necessity of a public or judicial decree or a publication.

2. Of course legislative provisions enact that curatory on account of insanity may take place only after respecting certain administrative formalities and, in more recent times, a judicial declaration of such condition is often required. It is not necessary to speak of this here. If a person has been placed under curatory at his place of domicile, or in his native country, it follows that he becomes internationally incompetent.

II. *But even without an actual guardianship, transactions undertaken by an insane person are internationally void.*

The condition of an insane person is ostensible to all who exercise the degree of care required in the affairs of commerce. This is at least true normally.

III. *In doubtful cases the right is reserved to the domestic state to submit the question of insanity to an independent examination.*

Even a person of weak mind may have a will recognizable in law. Furthermore, the existence of insanity, notwithstanding its "establishment" by foreign decree, may be a question of much doubt.

The medical conception of insanity and weakness of mind is often very different from that of law; both sciences have purposes and points of view of their own. Medical science has the cure in view, while jurisprudence asks whether the individual is in a condition to understand the purpose, scope, and significance of a legal transaction. It is for this reason that foreign conclusions cannot be blindly accepted. Where doubt of the insanity seriously exists, the place of sojourn or domicile is free to undertake a reconsideration of its existence.

2. Especially does the doctrine of England and America take this view, and correctly too. Wharton (§ 122) says, "A decree of lunacy, when entered by a foreign court, is from the nature of things open to impeachment for want of jurisdiction, for fraud, or for gross irregularity in the procedure." This is to be compared with the beginning of § 122, where it is said, "Patent lunacy is a notice to all parties of irresponsibility."

In America and England

"It is now settled in England and the United States that the appointment of a guardian of an infant or lunatic in one state

or country gives him no authority and has no effect in another, except so far as it may influence the courts of the latter, in the exercise of their independent discretion, to appoint the same person guardian, or to decree the custody of the ward to him" (Gray C.J. in *Milliken v. Pratt*, 125 Mass. 374). The tendency of modern statutes and decisions, however, is to defer to the law of the domicile and to support the authority of the guardian appointed there (*Hoyt v. Sprague*, 103 U.S. 613, 631; *In re Garnier*, L. R. 13 Eq. 532; *Nugent v. Vetzera*, L. R. 2 Eq. 704. See also § 2326, New York Code of Civil Procedure.)

§ 63. The Capacity to act of Married Women.

v. Bar, i, p. 421.

I. *A general incapacity of married women to act must be distinguished from an incapacity resulting from their legal position with reference to the marital estate.*

1. It can be said that the incapacity of married women to act is referable to two sources:—

- (a) the position of females in society, especially when married;
- (b) the regulation of their rights in respect of marital property.

The law of marital property regulates the question in how far a married woman is dependent upon her husband in dealing with her own fortune. In regard to her incapacity to act generally, the question is whether a transaction performed by her is valid (v. Bar, i, p. 520).

The limitation of the wife in regard to her capacity to act is the result of law governing family relationships. The Court of Appeal of the canton of Zurich thought that the subject belonged, without reserve, to the law of marital property, which, according to Swiss law, is governed, in respect of the rights of third persons, by the law of the domicile for the time being. If, therefore, a foreign married woman (*e.g.* an American), while on a tour in Switzerland, enters into legal relations, the law of the husband's domicile will govern (*Codmann v. Fischl*, "*Handelsrechtl. Entscheidung*," viii, pp. 61–62). The Federal Court, on the other hand, held (*A. E.*, xx, pp. 652–653) that the following questions must be determined separately:—

- (a) whether relations entered into by the wife without the husband's consent are invalid merely because of a right of the husband to the estate of the wife ;
- (b) of their invalidity on account of the wife's incapacity to act.

And this conclusion is entirely correct.

2. A different legal situation is presented as to widows and unmarried females of full age, in jurisdictions where the curatory for sex has been removed.

II. *Countries which support the lex patriæ unconditionally upon status, consider the entire legal position of married women in international matters to be dependent upon the law of their native state.*

By virtue of marriage, the wife acquires the citizenship of the husband, according to the almost universal conception. As a rule she also becomes major (Art. 1, Swiss Fed. Stat. Pers. Cap.; *contra*, e.g. in Austria).

It follows from the principle above stated that without regard to the law of the domicile or sojourn, a married woman is :—

- (a) competent everywhere if she be so according to her *lex patriæ* ;
- (b) incompetent or limited everywhere if she be so according to her *lex patriæ*.

Alien married women will therefore be found sometimes in the former, sometimes in the latter, position.

1. If a married woman be considered as under the guardianship of her husband, we may say that her position with regard to her capacity to obligate herself is the same as that of any other ward.

2. The reliance of a married woman upon the defence of *Senatus Consultum Vellejanum* (of the Roman law) is permissible abroad, if the law of her own country recognizes this defence. It amounts to a disability to act in particular cases (e.g. suretyship).

3. A married woman may require judicial authorization for certain acts (e.g. French *C. civ.*, Arts. 215–217). This limitation will also be respected abroad.

Conversely, the free hand of a married woman will be recognized, although the law of the place of the transaction provides for an incapacity, or limitation, provided the *lex patriæ* does not.

4. On the other hand, a wife separated from bed and board is

not under the authority of the husband. The authority ceases when the wife no longer cohabits with the husband. This is clearly expressed by the French Act of February 6, 1893, which gives to the wife her complete "*capacité civile*." Compare W. Cahn, "*Das Reichsg. über die Erwerbung und den Verlust der R. und Staatsangehörigkeit*," 2d ed., p. 77.

A French married woman, separated from her husband, may even change her nationality without his consent (*Journal de dr. i.*, xx, pp. 1135-1138).

In Austria, too, marital authority ceases with separation from bed and board. Compare Rittner, "*Österr. Eherecht*" (Leipzig, 1876), p. 333; Krainz-Pfaff, "*System des österr. allgem. Privatrecht*" (Vienna, 1889), ii, p. 311; Anders, "*Familienrecht*" (Berlin, 1887), iii, p. 26. Separated and divorced women are subject to separate jurisdiction. This is the effect of the Austrian Rules of Civil Jurisdiction of 1852 (§ 19), which have been continued by the Rules of August 1, 1895 (§ 70), in effect since January 1, 1898.

Of special importance are also the provisions of the Austrian Naturalization Act of December 3, 1863, which is still in force. § 11 provides:—

"In changing naturalization, the wife follows the husband if not divorced by law.

"Legally divorced or separated married women retain the naturalization which they had at the time of the divorce or separation."

From this is deduced a right in the divorced wife to acquire a separate naturalization (see Rittner, *supra*).

III. *In countries which support the principle of domiciliary law in regard to the status generally, married women are limited in their capacity to act to the extent of that law only.*

IV. *Special rules of law are applicable to tradeswomen. This applies also to their status.*

Statutes which are of importance in this connection are:—

1. Art. 7_b, Introd. Act, German Civil Code (see *supra*, § 58, III, 1).

2. Art. 10_b, Swiss Fed. Stat. Pers. Cap. (see *supra*, § 58, III, 3).

In America and England

In determining the status of a married woman, we note again that, although the courts express the doctrine generally in terms of

the domicile, they are far from applying it throughout in practice. Of course, where the act occurs in the country of domicile, it is governed by that law (*Miller v. Campbell*, 140 N.Y. 457; *Bradley v. Johnston*, 46 N.J. L. 271; *Cooper v. Cooper*, 13 App. Cases 88, 108 [opinion of Lord Macnaghten]). But where the act was performed in a country or state different from that of the domicile, the American decisions are almost uniform in applying the *lex loci actus* (*Halley v. Ball*, 66 Ill. 250; *Musson v. Trigg*, 51 Miss. 172; *Graham v. Norfolk Bank*, 84 N.Y. 393; *Evans v. Cleary*, 125 Pa. St. 204; *Milliken v. Pratt*, 125 Mass. 374). States which still retain the system of the old common law, involving a total incapacity to contract on the part of married women, do not defer to the *lex loci actus*, however, where a married woman domiciled in that State, enters into obligations abroad (*Armstrong v. Best*, 112 N.C. 59; *Baum v. Birchall*, 150 Pa. St. 164).

In England, on the other hand, a married woman domiciled in France has been held capable of making a contract upon English territory, for which she was incapacitated according to the law of England, but for which she was capable by French law (*Guépratte v. Young*, 4 De G. & S. 217).

Perhaps there is also a basis for making a distinction in these Jurisdictions, similar to that made by Swiss law (*supra*, § 58, III), between transactions which are strictly mercantile and those which are not (see Story, § 82; Dicey, p. 547).

§ 64. Suggestions for Legislation in regard to the Status of Natural Persons.

I. *It was early recognized that an exclusively uniform status in international matters leads to unfairness and injustice.*

1. For this reason the policy was favored of subjecting aliens sojourning in the internal state to the operation of the local laws.

Hugo Grotius, in his work, "*De jure belli ac pacis*" (ii, ch. xiv, No. 2), lays down the following: "*Qui in loco aliquo contrahit tamquam subditus temporarius legibus loci subjicitur.*"

This, as we have seen, is still the law of England and America, and, within certain limitations, that of Germany and Switzerland.

2. Art. viii of the proposed law of the French National Convention (1793) contained the following:—

"Aliens, during residence in France, are subject to the laws of the Republic; they are capable of all such transactions which these permit; their persons and their property are under the protection of the laws."

3. The proposal of the 24th *Thermidor* of the year 8 (*titre iv, "des effets de la loi"*) contained the following:—

(a) "Art. 1, § 4. The laws are expressly controlling upon those who inhabit the territory; the alien is subject to them during his residence, in respect of property possessed within the same, and of his person."

(b) "Art. 1, § 5. The French citizen residing in a foreign country continues subject to French laws for such property as is located in France, and in respect of everything touching his status and personal capacity.

"His movable property, like his person, is governed by French law."

II. *The Institute of International Law has repeatedly considered the question before us. Its activities have been especially directed toward tempering the influence of the lex patriæ upon the status. The final conclusions of the Institute refer only to commercial law.*

1. The following principle was laid down at Oxford (*Annuaire*, v, p. 57):—

"The status and the capacity of a person are governed by the laws of the state to which he belongs by nationality.

"When a person has no known nationality, his status and his capacity are governed by the laws of his domicile."

At the session of the Institute in 1882, von Bar proposed the following propositions (*Annuaire*, 1883, p. 49):—

"1. Personal capacity, even in commercial matters, is governed by the national law of the party.

"2. Provided, however, that if a party (or his successor) has acted in good faith, the contract (or act of purchase) shall be valid as far as is determined by personal capacity, if it would be so considered according to the law of the place of contract.

"3. In commercial matters, national law is replaced by that of the domicile in regard to everything which can be controlled by the free disposing power (or will) of the parties.

"4. For the acts and contracts made by a commercial entity of a foreign country, the law of the place where it was created is to be deemed the law of the domicile."

Goldschmidt favored the following amendments:—

“1. The capacity of the person in commercial matters is governed by the law of the domicile of the parties.

“2. Provided, however, that the contract shall be valid as far as concerns personal capacity, if it would be such according to the law of the place of contract.”

Finally, von Bar, in his large work (i, p. 400, note 36), proposed to add in Art. 2, after the words “in good faith,” the words “and without gross negligence.”

2. The Institute of International Law, at its session in Lausanne, 1888, resolved that a modification of the rule of *lex patriæ* was required, at least in regard to commercial relationships (*Annuaire*, 1888–89, pp. 103–104). The resolution is to the following effect:—

“Art. 1. According to the principles adopted at Oxford, the capacity of a person in commercial as in civil matters is determined by his national law.

“Art. 2. Nevertheless in *commercial matters* a petition of rescission based upon the incapacity of one of the parties may be denied, and the act considered as valid, by applying the law of the place where it occurred, provided the other party prove that he was led into the error by the person incapacitated or (in the discretion of the judge), by a course of peculiar circumstances.”

III. *A peculiar proposal was made by Westlake (Annuaire, 1888–89, p. 86):—*

“Personal capacity, even in commercial matters, is governed by the national law of the party; provided, however, that if the party has reached twenty-one years of age and the opposite party has acted in good faith, the law of the place where the contract was made shall be applied with reference to personal capacity.”

The idea of adopting a normal majority as here recommended is certainly worthy of respect, but it is at least arbitrary to the extent that it favors the age of twenty-one.

IV. *Laurent favored the readoption of the old professio juris into modern law.*

In Art. 15 of his proposed Belgian Code, the following is suggested:—

“The alien making contracts in Belgium must declare his personal status and the incapacity he is subject to, if any. In default

thereof, third parties dealing with him can demand the application of Belgian law, provided they have acted in good faith.

"When the parties execute a written agreement in Belgium (*acte authentique*), the notary must, upon his own responsibility, demand that they state whether they are aliens, and if so, their status."

This idea seems good theoretically, though rather inconvenient in practical life.

V. *Such limitations upon the capacity to act as are founded upon special individual circumstances, and which in the regular course of things cannot be known to the other contracting party unless specially informed of them, have no extra-territorial effect.*

1. *With regard to wards.*

There is no doubt that parties who have contracted with wards and who have been deceived not purely through their own disingenuousness ("*vana simplicitate*," *lex 3 de Senatusc. Mac.* 14, 6) should be protected when not aware of the decree of disability. Their good faith is here preferred to the general principle of personal status, but only when they could not, or must not, have concluded from the whole trend of the business, or from the surrounding circumstances, that they were dealing with a ward. The idea expressed by the Institute would thus be properly put into practice. Compare also *Journal*, ii, p. 20: "A decree emanating from a foreign jurisdiction establishing a special incapacity of an individual with regard to the disposal of his property, can only have effect within the state wherein it was decreed; it is without influence upon contracts executed outside the territory of that state, especially with reference to immovable property located in France."

2. *With regard to the insane.*

Questions which suggest themselves for legislative determination are:—

- (a) whether third parties may enforce obligations entered into by the individual in question, when they do not know and could not be expected to know of this incapacity prior to an official decree;
- (b) whether an incapacity may be predicated when the person in question has so conducted himself after the official decree, that the other party, without negligence on his part, failed to recognize the condition.

In both these cases it would seem that the transaction should be supported in the interest of *bona fides* in international intercourse. The liability of the guardian may also come into question, when, for instance, he permits the lunatic to go at large and fails to provide for his confinement.

- (c) The suggested modification of the principle seems to be most needed where the insanity is established by the sentence of a criminal court.

At all events, it should not necessarily be the aim of future legislation to regulate the status in international matters exclusively according to the *lex patriæ* or *lex domicilii*. Concessions should be made to one or the other theory, but they should not go so far to the other side as to make the standard of status purely territorial. It will be a matter for reflection whether it be advisable to proceed:—

1. according to the conclusions reached by the Institute of International Law; or

2. with the idea of effecting a modification of the *lex patriæ* as in Art. 27, Introductory Act to the German Civil Code; or

3. with the idea of treating the status as territorial in *certain* directions, most especially in regard to transactions executed:—

(a) at fairs and markets,

(b) at exchanges.

I cannot understand why the preliminary draft of the new civil code for Switzerland proposes the following provision in Art. 13:—

“An alien incapacitated to act by the law of his country cannot rely upon his incapacity after executing a transaction in Switzerland, if he possessed the capacity to act according to Swiss law at the time of execution.”

In my publication on the “Codification of the Private and Penal Law of Switzerland,” 1901, pp. 119–120, I vigorously opposed the adoption of any such unlimited territorial rule. The present Swiss law (which I discuss briefly at p. 115 of the work just cited) should not be extended in this regard. What would Argentræus, the great hero of feudalism, say to this supplementary triumph of his doctrines, or rather to the fact that in the twentieth century he was still being outdone? In view of Art. 13 just cited, the Netherlander, Ulrichus Huber, would be obliged to withdraw his theory

still further from the idea of *status uniformis* in international matters. I must, however, add that Art. 13 has received the approval of Marcusen (*Zeitschrift für internat. Privat- und Strafrecht*, R., xi, p. 45). He believes that modern opinion is almost unanimous in favoring this limitation of the personal status "for the benefit of the *lex fori*." I must say I was overwhelmed at this astounding statement. Art. 13 is opposed by George Cohn in his article in *Z. für vergl. Rechtswissenschaft*, xv, p. 432.

§ 65. Upon Certain Peculiarities of Status and Capacity to have Rights.

v. Bar, i, p. 406; 414.

I. *In regard to privileged status.*

1. Privileges accorded by rank to the personal status cannot be recognized in the private law of another state, where such favoritism is unknown. Especially is this so in states which constitutionally proclaim the equality of all persons before the law, such as Switzerland (Art. 4, Cons.) and the United States of America (Amend. XIV).

2. A noble *title*, however, is to be recognized everywhere as a private right. We will discuss this question later.

II. *In regard to servitudes.*

1. Servitudes, such as, for example, slavery, bondage, civil death, and infamy, which offend partly international public law and partly international good morals cannot be recognized extra-territorially. This follows from the distinction heretofore made (§ 57, I, *supra*) between the status and the capacity to have rights, but it is repeated again here in the form of a coercive rule, even though the distinction be not accepted.

2. Neither should a disability to have rights, ascribed to a person for religious reasons, be supported extra-territorially. A withdrawal from the national Church of Sweden works an incapacity to inherit. In international matters of private law we might say "*la recherche de la religion est interdite*." Such a limitation is not to be tolerated in a state to which it is foreign.

3. An interesting question is whether an abbreviation of the capacity to have rights must be recognized, according to the law of the Catholic Church, because a person has entered a religious

order. This question becomes a practical one, particularly in the law of succession. A vow of poverty (*votum paupertatis*) may be recognized as a basis for a certain incapacity to have rights, outside of the jurisdiction in which it is made, only provided the latter attributes to it a *legally* binding character. This is not the case in most countries, where freedom of creed and conscience rules, though this does not militate against its validity from the religious point of view.

4. The marriage of a foreign monk according to whose personal status the vow has *legally* binding force, cannot be recognized as valid in a state which supports the theory of *lex patriæ* in respect of the capacity to marry, provided it, also, recognizes the vow as a private legal act. This again will not apply in countries recognizing freedom of conscience.

The marriage of a French woman with a Spanish monk was annulled in France for this reason (judgment of the *Cour de Paris*, June 13, 1814; Brocher, "*Cours de droit i. privé*," i, p. 175, note 1). The decision is supported by von Bar (i, p. 413, note 24) and has been followed by the French courts in a recent case in which the marriage of a Catholic priest, celebrated in London according to English forms, was declared null (*Rouet v. Rouet*, *Trib. Civ. de la Seine*, 1886, *Journal*, xiv, p. 66).

5. But even in states assigning to the *votum paupertatis* a private legal significance, a monk does not entirely lose his capacity to act.

In America and England

Disabilities of the status which are unknown to the law of these Jurisdictions will not be given extra-territorial effect. Within this category are such disabilities as result in a foreign country from slavery, infamy, distinctions of creed or class, or civil death (Story, §§ 91, 92, 620-624; *Hyde v. Hyde*, L. R. 1 P. & D. 130; *Forbes v. Cochrane*, 2 B. & C. 448).

It has been said that "it is a general principle that the penal laws of one country cannot be taken notice of in another" (Buller J. in *Ogden v. Folliott*, 3 T. R. 726, 733). As stated, the principle is too broad; for foreign penal laws will be observed so far as they affect the capacity to act within the particular foreign territory (see Story, § 92). Furthermore, "the question whether

a statute of one State, which in some aspects may be called penal, is a penal law in the international sense so that it can be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the *public justice* of the State, or to afford a private remedy to a person injured by the wrongful act" (*Huntington v. Attrill*, 146 U.S. 657). The court held that in the former instance the law has no extra-territorial effect, while in the latter, it has.

Where a foreign statute forbids the re-marriage of the guilty party after the granting of a divorce, the disability imposed upon the status of such party is held, by the weight of authority, to be *penal* in character, and will not be recognized extra-territorially so as to invalidate a second marriage (*Moore v. Hegeman*, 92 N.Y. 521; *Com. v. Lane*, 113 Mass. 458; *State v. Weatherby*, 43 Me. 248).

§ 66. The Capacity of Juristic Persons.

Van Berghem, "*Capacité civile des corporations étrangères d'après le projet de révision du Code Napoléon soumis au Chambres belges*," in *Revue de dr. i.*, xxi, pp. 1 et seq.

Lainé, "*Les personnes morales en droit int. privé*," in *Journal de dr. i.*, xx, p. 273. Sacoupulo, *Les personnes morales* (Geneva, 1898).

Mamelok, *Die juristische Person im internationalen Privatrecht* (Zurich, 1900).

1. *The personal status of juristic persons is determined by the law of the place of their creation.*

It is frequently said that the recognition of juristic or artificial persons, such as charities and associations, must be governed by the principle of nationality so frequently accentuated in modern times. This, however, is an exaggeration of the scope of the principle, as nationality is determined by citizenship, which is denied to juristic persons. If we were to refer to the nationality of the members composing them, we would most frequently reach a negative result, and the question would confront us whether the amount of capital or the number of persons should be authoritative. In the acquisition of property rights, however, juristic persons are regularly treated as favorably as natural persons.

The recognition of juristic persons upon principle, depends upon whether they are a legal entity according to the law of their "seat" or location. From this it follows:—

1. that the formal requisites for their creation are governed by their "personal status" as understood in this sense;

2. that the same is also true with regard to the substantive requisites for their creation and the provisions governing their dissolution.

II. *There are, however, certain limitations or exceptions with regard to their capacity to have rights.*

1. Ordinances belonging to the industrial laws of the internal state must be obeyed without regard to the law of the place of their creation.

2. Prohibitive laws of the internal state, *e.g.* against the accumulation of lands in mortmain, must also be respected. Here a reference to their so-called personal status would result in absurdity, as these prohibitive laws would simply be vain as against foreign juristic persons.

3. Juristic persons existing in contravention of international public law, *e.g.* for privateering, for the conduct of the slave trade, for espionage, will not be recognized.

4. The local law may also make the right to acquire land, or to receive gifts, dependent upon ratification by the local government.

III. *Positive legislation has regulated the question only casually.*

1. With regard to the law in Germany (see Plotke, "*Die Rechtsfähigkeit ausl. jur. Personen*," *etc.*, in *Zeitschrift für internat. Privat- und Strafrecht*, x, pp. 211, 269) reference is to be made to Art. 10, Introductory Act:—

"A society belonging to a foreign state and having legal capacity therein, and which can acquire legal capacity in the inland only according to the provisions of §§ 21, 22 of the Civil Code, will be considered as having such capacity, when the same has been recognized by resolution of the Bundesrat."

2. The Swiss legislature has not directly settled the question. Art. 10 of the Fed. Stat. Pers. Cap. does not refer to juristic persons (see decision of Fed. Court in *Journal de dr. i.*, xvii, pp. 518–519). The message of the Federal Council accompanying this statute states (*Bundesb.*, 1879, iii, p. 772) that the ways and means by which *juristic persons* may be recognized as legal entities, depend upon their inner organization and is not within the scope of this statute.

3. Foreign charities (*Stiftungen*) and corporations are expressly given recognition in the following acts:—

- (a) Spanish Civil Code, Art. 28;
- (b) Montenegro Civil Code, Art. 787;
- (c) Argentine Civil Code, Art. 44.

With regard to English law, Dicey (p. 485) lays down the following rule (No. 125):—

“The existence of a foreign corporation duly created under the law of a foreign country is recognized by the court.”

And Dicey adds:—

“The principle is now well established that a corporation duly created in one country is recognized as a corporation by other countries. Thus it is a matter of daily experience that foreign corporations sue and are sued in their corporate capacity before English tribunals.”

IV. *Nations recognized by International Public Law, as well as provinces and communities, must be considered as juristic persons when they enter into private legal relations.*

This is well settled in France and Belgium, and holds good no doubt also in Germany, though Art. 10, Introductory Act, does not specifically so state.

The *papal office* is also recognized internationally and is not regarded merely as an Italian public institution. It therefore has capacity to have rights and capacity to act.

1. The attempt has been made in Belgium to regulate the question by statute once and for all. Van Berghem (*Revue de dr. i.*, xxi, pp. 1–2) cites the following provisions of the act (Art. 13):—

“Foreign states, provinces, and communities, as well as the institutions subordinate to them, shall exercise in Belgium such civil rights as are granted to them by the foreign law. However, they may not accept gifts or legacies therein unless authorized by the Belgian government.

“Unless otherwise provided by law or treaty, other juristic persons created abroad shall have no existence in law in Belgium, unless similar institutions established within the kingdom also enjoy the privilege of civil personality. In this case they are permitted to exercise such civil rights as are derived from the foreign law, subject to the same conditions and restrictions as are imposed upon juristic persons of the same kind in Belgium.”

2. The Italian *Codice civile* contains the following provision (Art. 2): —

“Communities, provinces, public institutions, whether civil or ecclesiastic, and in general all juristic bodies recognized by law shall be treated as persons and enjoy civil rights according to the laws and customs observed as public law.”

This is of course no international rule, but it is important in regard to the International Private Law of Italy because the *Disposizioni* in Art. 6 speak bluntly of “*persone*.”

V. *The Institute of International Law has adopted a series of regulations relating to juristic persons as a model for future legislation.*

The conclusions of the Institute are contained in *Annuaire*, xvi, 1897, pp. 307–308.

In the main they are in harmony with the principles as here laid down. It seems that all mention of the papal office has been purposely omitted.

In America and England

It is held with great uniformity that a corporation has no legal *status* outside of the state by which it was created (*Bank of Augusta v. Earle*, 13 Peters 519; *Life Ins. Co. v. Beebe*, 48 Ill. 87; *Lancaster v. A. I. Co.*, 140 N.Y. 576). But although thus differing from the European rule, foreign corporations are treated with equal, if not greater, liberty in England and America than they are upon the Continent, with regard to their power to enter into legal relations in the internal state. This result is reached by the doctrine of comity, according to which all powers granted by the charter of an entity created in a foreign country are recognized in the local state so far as not inconsistent with the laws and policies of such state (*Lancaster v. A. I. Co.*, *supra*; *Ex parte Schollenberger*, 96 U.S. 369; *Farmers' Ins. Co. v. Harrah*, 47 Ind. 236; *Lindley on Company Law*, pp. 909–914). The powers of the corporation, such as for instance its powers to hold land, must therefore be referred both to the law of its creation *and* to the law of the place where it proposes to exercise such powers (*Relf v. Rundle*, 103 U.S. 226; *Ernst v. R. & B. S. Gas Co.*, 36 N.Y. App. Div. 167). England has entered into treaties with most of the countries of Europe as to the mutual recognition of foreign

companies. The treaty with Germany states (March 27, 1874): "such companies or associations, authorized in either of the two countries, shall only be admitted to the exercise of their business or trade in the dominions of the other country, if found to be in compliance with the conditions prescribed by the law of that country."

From the doctrine of comity as above stated, it follows that where personal property is left to a foreign corporation, the local court, unless prevented by some local policy, will direct it to be paid or handed over to be dealt with according to the laws of its creation (*New v. Bonaker*, L. R. 4 Eq. 655; *Atty. Gen. v. Sturge*, 19 Beaver 594; *Westlake*, Pr. Int. Law, § 282; see also *R.R. v. Gebhard*, 109 U.S. 527).

The question of legal capacity to do particular acts must be clearly distinguished from the question whether or not the transaction itself will be accorded validity. Thus the corporation may be denied the right of relying upon its incapacity to the detriment of third parties, and persons dealing with the corporation may be estopped from denying its capacity to act (see *Lancaster v. A. I. Co.*, cited *supra*). The question of the validity of its acts will be governed by the rules ordinarily applicable to the particular transaction, according to the laws of conflict (*Bard v. Poole*, 12 N.Y. 495; *Rothrock v. Ins. Co.*, 161 Mass. 423).

The term "juristic" or "moral" person as used in the jurisprudence of the Continent embraces not only corporations and other entities created by law, but also partnerships. This seems also to be the rule in Scotland. It has been held, however, that the conception is one of procedure, and therefore, where a foreign partnership is not sued in the form of a separate entity as provided by the foreign law, the latter law cannot be pleaded, as the *lex fori* is alone applicable (*Bullock v. Caird*, L. R. 10 Q. B. D. 276).

NOTE

Under the heading of International Commercial Law, we will treat specially of foreign *commercial* organizations and their branches in the internal state. See §§ 165-166, *infra*.

§ 67. *Venia ætatis* (*émancipation*).

In countries deriving their laws from the Roman system, a minor may be declared of full age either by his father, by a judi-

cial authority, or by the sovereign, when he has reached a certain age fixed by statute. This assignment of majority by declaration is known in the Roman law as "*venia ætatis*" (French, "*émancipation*"; German, "*Jahrgebung*").

I. *Venia ætatis* is dependent upon the personal statute.

1. Especially is this the case :—

(a) in determining the substantive requisites upon which majority (*venia ætatis*; *émancipation*) may be assigned ;

(b) in determining what authority (the sovereign, judicial officer, father, etc.) is competent.

2. Art. 7₈ of the Swiss Fed. Stat., *N. & A.*, provides :—

"The attainment of majority (by declaration) is subject to the same law and jurisdiction as controls the authority of the parent or guardian."

The attainment of majority is a matter determined by cantonal law, although federal law has enacted two limitations, viz. that majority may be assigned only to persons who have passed their eighteenth year, and also that only one authority may be competent.

As the question of parental authority is governed by the law of the domicile, the attainment of majority pursuant to Art. 7 is also governed by it. The question is closely connected with the interests of commercial intercourse, and therefore it is natural that the domiciliary law should be favored.

II. *When majority is assigned by the law of the personal statute, its legal effects are to be recognized everywhere.*

1. This proposition was formerly denied (*e.g.* J. Voet, "*Commentarius ad Pandectas*," book iv, title v, § 8).

2. In modern times, it is held to be immaterial that the local state does not recognize this institution of the law, or assigns different requisites; in either event the assigning of the *venia ætatis* in a foreign state involves a change of the status.

III. *Majority attained "per nefas" may be revoked under certain circumstances, such as the annulment, in whole or in part, of a naturalization.*

Such an annulment occurred in the Desfours case. I obtained a revocation of an authorization granted by the Federal Council to acquire Swiss citizenship, for the reason that Count Desfours had

no right to act for the Countess and the children. With this annulment, the basis for the attainment of majority, which had already been accomplished within the canton of Zurich (the new place of citizenship of the children), also fell away (see *Bundesb.*, 1900, i, p. 677).

IV. *A question to be determined separately in each case is whether the venia ætatis creates a capacity to marry.*

This also is to be determined by the authoritative personal statute. Neither in France nor in Switzerland, for example, does it create the capacity. In the former country, the statutory age is absolute (Art. 144, Civil Code); in the latter, the age of marriage, whether above or below majority, is determined by the physical development of the person (*Bundesb.*, 1894, ii, p. 20, and 1898, i, p. 437).

§ 68. Rights in Names.

I. *The right to a particular name or title is a right of private law resulting from personality. Its nature, scope, and means of protection are to be referred to the personal statute.*

1. A right in names has only recently been recognized as a private right within the law of persons. In former times, it was a privilege. It embraces not only the right to a designation in civil life but also :—

- (a) the right to a pseudonym ;
- (b) the right to a coat of arms ; usually this accompanies the protection accorded to personality, though it may also exist independently.

2. Juristic persons enjoy an equal right to the protection of their names.

3. Even in countries in which nobility is not recognized as a public institution, a title of nobility should be recognized and protected, provided of course that the domestic law does not contain an express prohibition against its use. It must appear in the clearest terms that this veto applies also to aliens. The recognition of foreign titles of nobility is not forbidden, for example, by Art. 4 of the Swiss Constitution (compare also Art. 12):—

“All Swiss stand as equal before the law. There shall be in Switzerland no relation of servitude, no privilege of location, birth, family, or person.”

A similar provision is contained in Amendment XIV of the Constitution of the United States. But these clauses are uttered against noble privileges, not against noble names.

II. *The personal statute also governs a general change of name.*

1. The cases which arise are : —

- (a) a complete change of the family name ;
- (b) a change of the Christian name ;
- (c) additional names or appendages (*e.g.* as provided by testamentary request) ;
- (d) titles affecting the former name.

2. In the nature of things, circumstances existing at the place of domicile must also be taken in account, though the national law and national forum work the alteration in the name. Thus mistakes in traffic, especially in postal mandates, may arise through a similarity of names. Such *facts* may constitute an argument in favor of the change ; the *legal* basis must exist in the personal statute.

3. There may be cases where the state of the domicile, notwithstanding a recognition on principle of the *lex patriæ*, still applies its own law as an exception. For example, were the home state (*e.g.* Turkey) suddenly to prohibit the further use of a particular kind of name (*e.g.* those of Greek origin), compelling the adoption of one more typical of nationality, the domiciliary state might well conceive such a provision to be a deprivation of the rights of its own inhabitants. Of course, where a state supports territorial law generally in respect of the status, the legal situation is clear.

§ 69. The Existence and End of Physical Personality.

v. Bar, i, pp. 373-377.

I. *The question whether, for physical reasons, a being is or is not to be considered as a person, is regularly determinable by the presumptive lex patriæ. It is a question of status.*

1. It is an important matter to determine at what time personality begins, because the acquisition of rights dates from that moment. The moment of birth is not always an easy matter to determine (see German Imp. Court, Pen. Cases, xxxiii, pp. 435-438). Some statutes declare the requisite to be *vitality* or the *power to live* (Art. 906, French *Code civil*), while others, follow-

ing Savigny ("*System*," ii, p. 385), do not adopt this standard, but base the capacity to have rights upon the completion of birth alone (German Civil Code, § 1).

We cannot say simply that the law of that place governs, where the event of birth occurs. The question is not alone whether a person has the capacity to have rights, but whether legally and physically we are dealing with a human being at all. It is a question of private legal status in the physical sense.

As a new-born child is not in a position to conclude legal transactions, the point of interest is whether it is in a position, as a subject of the human race, to be an heir, or to acquire gifts or rights made dependent upon its birth.

It is also important to establish from what time forth a person is to be considered as no longer existing; for, from this time rights cease and vest in the heirs. The precise time of death is often a very difficult matter to determine, especially when questions of survivorship are involved.

II. *A number of international questions arise in connection with modern statutes providing (contrary to Roman law) legal presumptions upon the continuance of life and the fact of death. They differ juridically in nature, and cannot be grouped under a uniform principle.*

The questions most frequently arising are:—

1. if, and to what extent, a person who has disappeared (*Verschollene*) may legally transact business, *e.g.* through an attorney appointed previously (this depends obviously upon whether the person is presumed to be living or dead, and is a matter of personal law);

2. whether a *curator absentis* must be appointed (this is a matter of family law, and is governed by the rules of conflict applicable there);

3. whether succession takes place (here we must distinguish active from passive succession).

(a) The question whether an inheritance by will or an intestate succession in favor of a person who has disappeared, may be deferred, or whether it lapses, is one of *active* succession. It is, therefore, determinable by the system of law under which the estate is administered (German Imp. Ct., Civ. Cases, xxv, p. 142).

Closely connected with this is the determination of the proper

party to represent the "*Verschollene*." This is a matter of personal law, and is referable to the system of law which determines status. But the law governing the estate may, *for administrative reasons*, require the observation of formalities and the compliance with requisites other than the appointment of a special guardian, *e.g.* the giving of guaranties.

- (b) The question whether the estate of the person who has disappeared is itself subject to administration is one of *passive* succession. It is governed by the system of law which would be competent to administer the estate of the person in question, in the event of his decease; for we are here dealing with the requisites to the existence of an inheritable estate.

III. *The official declaration of the disappearance or death of a person is governed by the law and forum which control the status.*

1. The countries of Continental Europe mutually recognize these decrees issued by them, because they affect the civil status. Some exceptions are, however, to be noted.

2. The German statute (Art. 9, Introductory Act) is generally in accord with the principle, but enacts three exceptions for practical reasons (v. Buchka, "*Vergleichender Darstellung des bürgerlichen Gesetzbuches und des gemeinen Rechts*," 1897, pp. 8-9), viz. :—

- (a) a person who has disappeared may be declared dead in the inland if he was a German at the beginning of his disappearance;
- (b) even though he was an alien at the beginning of his disappearance, he may be declared in the inland as dead for the purpose of accomplishing such relationships as would be governed by the law of Germany, and especially in regard to property located in Germany;
- (c) if the person was an alien married man, having his last domicile in the inland, and the wife living, or returning thereto, was a German, at least to the time of her marriage, he may be declared as dead on the motion of the wife, without the limitations mentioned under (b).

3. Another exception (besides those positively enacted in Germany) makes the courts of the place of domicile competent to declare death when the alien has lost his right of citizenship by reason of his disappearance (*e.g.* after ten years, according to the German Imperial Statute). In such a case, the installation of the presumptive heirs into possession of the estate should properly be

preceded by an official summons (*Handelsrechtl. Entscheidg.*, pp. 180-181).

4. Different results are reached, according to English and American law, by reason of the separation of estates into real and personal. In fact, a separate declaration of death is required in all systems where succession to immovables is governed by the *lex rei sitæ*.

In America and England

A declaration of the death of a person decreed by a foreign court will have the same force in our courts as that attached to foreign letters of administration, and, therefore, may be impeached collaterally. See Wharton on Evidence, § 1278, and cases there cited.

LAW OF THE FAMILY

§ 70. Introductory Remarks.

I. We have already seen (§ 7, *supra*) that in the various countries of the world, the rules of conflict applicable to the family relationships of aliens differ materially.

II. Rights and duties of a family nature, as also for the most part those in succession, are based upon natural facts (*i.e.* family relationship). If relations of the family are founded upon contract (*e.g.* betrothal, marriage, recognition or legitimation of children), we speak of rights of condition (*Zustandsrechte*). On the Continent of Europe the national law is the most frequent, though not an absolute, standard.

III. Agreements of the parties designating the system of law to be applied are, as a rule, of no effect in family matters, *e.g.* in regard to parental authority, guardianship, divorce, and separation.

IV. There are a number of treaties bearing upon family law; they refer to guardianship, marriage, divorce, and separation.

1. Affecting the law of the *German Empire*, the following are to be noted:—

- (a) Consular treaties with *Greece* (1881), Art. 22; *Italy* (1868–72), Art. 11, No. 7; *Spain* (1870–72), Art. 11, No. 8:—

“Consuls may, in the proper cases, initiate curatories, or guardianships, in accordance with the laws of their own country.”

- (b) With *Servia* (1885), Art. 18.

- (c) With *Salvador* (1870–72), Art. 27; *Guatemala* (1887–88), Art. 25; *Honduras* (1896–97), Art. 25; *Nicaragua* (1896–97), Art. 25. These treaties give the consuls of both contracting nations the power to define the legal duties of guardians of minors of their own country under the responsibility provided by their own laws.

- (d) With *Japan* (1896), Art. 13:—

“Consuls General or Vice-Consuls may appoint guardians for subjects of their own country, and are also permitted to superintend the conduct of guardianships or curatories according to the laws of their own country.”

2. Affecting the law of *Switzerland* there are the following treaties:—

- (a) With *Italy* (1868), and Art. IV of the protocol (*A. Sammlung*, ix, pp. 726 and 758). This treaty does not contain any express rules upon guardianship, but the practices of both states agree in allowing the *lex patria (originis)* to control guardianships of minors instituted immediately upon the death of the father.
- (b) With *France* (1869), which treats of guardianship (Roguin, "*Conflicts des lois suisses*," pp. 87, 189). Art. 10 provides that the *lex patriæ* shall apply to the minors and wards of either country residing in the other. Also, that disputes over the appointment of guardians, or the management of estates, shall be referred to the national jurisdiction. The treaty applies also to Tunis (*N.F.*, xvi, p. 12).

V. There are treaties for the exchange of records of events affecting the civil status (R. de Card, "*Études de dr. i.*," Paris, 1890, pp. 1-36). The certification of births, marriages, and deaths is conducted in many states by officers of the civil status. This is not the case, however, in Austria, Russia, Sweden, Denmark, or Portugal. Switzerland has agreements with an array of states for the gratuitous exchange of such records (*Handb. für schw. Civilst. Beamten*, 1881, p. 181), e.g. Austro-Hungary, Belgium, Italy, and Spain. An exchange is made in practice with all German states, but not with France (*Bundesb.*, 1894, ii, p. 11).

VI. The International Conferences of The Hague elaborated treaties, which have now been ratified, upon entrance into marriage, divorce, and separation, and the guardianship of minors (see Appendices I-III).

§ 71. Betrothals.

I. *The capacity to enter into a betrothal, or contract to marry in the future, is governed by the personal law of both parties. If the nationality of the parties differ, the capacity must exist by both systems. The contract establishes a family relationship.*

1. Wherever betrothals are given legally binding effects, they constitute preliminary contracts of family law. Although not an end in itself a betrothal is the first step toward establishing family relationship (*A. E.*, xv, p. 432; xix, p. 399; xxii, pp. 532 and 1136). In Germany a different view prevails (Stutz, "*Die Rechtsnatur des*

Verlöbnisses," 1900), as the Civil Code (§§ 1297 *et seq.*) does not permit an action for performance, or for damages to the extent of performance. There, as in France, special damage must be shown.

2. Being a family contract, the national law of both parties is authoritative on the Continent of Europe.

3. The territorial rule applied to the status in some countries, does not apply to the capacity to enter into a contract to marry (Art. 7, German Introductory Act).

II. *The rule of "locus regit actum" applies to the form of betrothals.*

The observance of the forms of the place of betrothal, though the place be accidental, will suffice. To evade this rule, the personal law of one of the betrothed would have to provide that the forms prescribed by *it*, apply also when a betrothal of one of its subjects occurs out of the Jurisdiction. To my knowledge, such a requisite no longer exists anywhere. There formerly existed in Bavaria an ordinance (1806), according to which a betrothal could only take place "judicially under the regular temporal Jurisdiction at which both, or at least one, of the parties had their *forum ordinarium*, or *privilegiatum*." The Supreme Court of Bavaria held that this ordinance was applicable even to betrothals entered into without the Jurisdiction (Böhm, "*Die räumliche Herrschaft der Rechtsnormen*," p. 37).

III. *There is a difference of opinion as to which system of objective law (excluding status) shall be applied in determining the results of a breach of the contract of betrothal (i.e. amount of damages, whether compensatory or punitive, outlawry of the action, etc.).*

1. This difference is easily conceivable, because the liability for damages, or for other satisfaction, has been based upon varying theories, *e.g.* : —

- (a) a promise of guaranty;
- (b) a *culpa in contrahendo*;

- (c) a rule of equity;
- (d) a tort.

The question of liability for breach of contract is to be determined separate from the liability in tort.

2. As a matter of customary law, the law of the place of performance has been repeatedly declared authoritative. The place of performance is declared to be that at which the betrothed parties, in the nature of things or by agreement, would have located their

first common domicile after marriage (Seufferts, *Archiv* 20, No. 1). The German Imperial Court has reached the same conclusion (vii, p. 340). Inasmuch as its performance lies in marriage, the domicile of the future husband, in the absence of special agreement, is to be considered the place of performance; for it is the seat of the marital relation itself. In a further decision (xx, pp. 334-336), the court held that the place of performance was not where the marriage was to be solemnized by the civil authorities, because that depends upon all kinds of coincidences, but the place at which the betrothed are to establish their domicile, to consummate marriage, and to begin the mutual life of the household. "This place (*domicilium matrimonii*) is that at which the performance of the promise to marry is thought of and expected, and at which the betrothal is to have its effects, as evidenced by the will of the parties."

In a later decision of the Imperial Court (xxiii, pp. 172 *et seq.*) it was stated that the parties did not need to have any uniform will upon the future matrimonial domicile, and that a promise of the husband to remain at a particular place was void. Continuing, the court said (p. 177):—

"It is in itself incorrect to conceive the establishment of a common matrimonial life as the 'performance' of the betrothal. We can only speak of performance when a betrothal is considered as an obligatory contract. There is, indeed, something of this in its nature, although only a *personal* relationship, combined with certain legal results, is founded through it. The transaction, however, toward which this contract is directed, arises only in the execution of another contract (of marriage), which in its turn is not an ordinary obligation, but a contract dealing with family rights, having for its immediate legal result the establishment of the permanent personal relationship of matrimony. In this latter point lies the peculiarity of a betrothal in its character as a contract of obligation in comparison with the ordinary so-called *pacta de contrahendo*, which in other matters it completely resembles."

Though citing this decision of the Imperial Court, the Supreme Court of Hamburg derived "a fixed legally binding assent of the parties to regard the local law of the bride as authoritative upon the effects of the betrothal" from the following circumstances:—

- (a) that, as a matter of fact, there was nothing said as to having either the religious or the civil ceremony at a different place (*e.g.* at the residence of the prospective husband);

- (b) that there was a widely diversified *practice* (in the circle of society in which the parties moved) of *having the wedding at the domicile of the bride*.

Nothing was said as to where the civil ceremony was to take place; "but as in many circles this event is given considerably less significance than the religious ceremony, it seems manifest that the civil ceremony was to occur at the same place as that arranged for the religious act" (*Zeitschrift für internat. Privat- und Strafrecht*, x, pp. 46-50).

3. Unofficial authorities (*e.g.* Regelsberger, "*Pand.*," i, pp. 176-177) have laid down the proposition that the liability for damages is controlled by the personal statute of the guilty party. The limitation is added, however, that there shall be no liability for damages unless the personal statute of the other betrothed party provides for it.

Von Bar states (i, p. 479) that in the case of a real conflict of laws, when the betrothal is invalid according to the personal statute of the man, but valid according to that of the woman, the event must be decided in favor of the former and the suit dismissed. In his "*Lehrbuch*," von Bar (pp. 76-77) says that the binding force of a betrothal is to be determined according to the personal statute of the person betrothed; if one party is not bound in accordance with his personal statute, neither is the other bound.

4. The view has also been advanced that the *lex fori* should control (compare Böhm, *supra*). This jurist claims that the question whether there is an actionable claim is governed by the law of the place of process. Unger ("*System des Österr. Pr. R.*," i, § 23, p. 192) arrives at the same result when he says that a betrothal (*sponsalia in futuro*) is governed by the law of the place where its non-performance is the basis of a suit. This must be accepted as the law of Austria, as § 45 of the Civil Code is of a clear and peremptory nature. It provides as follows:—

"A betrothal or preliminary promise to marry, no matter under what circumstances or conditions it was given or received, effects no legal obligation either to enter into marriage itself or to do that which was made conditional in the case of non-performance."

5. According to Swiss Law, betrothal is governed by the national law of the prospective husband (Art. 8, Fed. Stat., *N. & A.*). Accordingly, a liability for damages is possible in

case of breach of contract to marry, although the national law of the woman does not recognize it. Thus, if a Frenchwoman should break a contract to marry a Swiss, the latter would have a cause of action if, and to the extent, that the cantonal law to which he was subject permitted it. Conversely, the Frenchwoman would have a cause of action if the Swiss were guilty of a breach, *although in France betrothal establishes no legal relationship*. The deductions of Regelsberger and von Bar therefore do not apply in Switzerland.

IV. *The lex delicti commissi is applicable where a tortious act, independent of the breach of contract, has taken place.*

1. The breach of a contract to marry is not in itself a tort, even though wholly ungrounded. It may, however, be the basis of a tort where the betrothal was entered into for the purpose of causing injury.

2. The *lex delicti commissi* is particularly applicable under a system of laws which permits of an action only in tort (*e.g.* the French system).

V. *Where betrothal establishes a right of succession, the right is governed by the law under which the estate is administered.*

1. Certain laws give betrothed persons a mutual right of succession (*e.g.* cantons of Zurich, Glarus, and Grisons). These laws do not go so far as to create a peremptory quota.

2. If, for example, a Portuguese betroth himself in Davos with a Swiss woman, after a transient sojourn there, she would have no claim in succession in the case of his death before marriage, as the Portuguese law, which would be authoritative for administering the estate, recognizes no such claim.

VI. *Contracts of succession between betrothed persons are governed by the usual rules relating to succession.*

An exception is presented by Art. 25, Fed. Stat., *N. & A.*, which provides as follows:—

“A contract of succession *when made between betrothed persons* is to be interpreted according to the law of the first matrimonial domicile. . . .”

§ 72. Entrance into Marriage.

M. Verger, *Des mariages contractés en pays étranger d'après les principes du droit international privé et du droit civil* (2 ed., 1883).

P. Pic, *Mariage et divorce en droit international* (1885).

L. Petitpierre, *Des conditions, des formalités du mariage et de ses effets sur la capacité des époux au point de vue du droit international* (Neuchâtel, 1884 Diss.).

E. Stocquart, "*Le mariage en droit international*," in *Revue de droit i.*, xix, pp. 581-608.

A. Capacity to Marry

I. *On the European Continent, the capacity to marry is regularly governed by the lex patriæ.*

The capacity to marry has been regulated differently than the capacity to act in general. Majority does not of itself imply the capacity to marry. In some systems, it is a question of physical development (*Bundesb.*, 1894, ii, p. 20; 1898, i, p. 437).

1. Capacity to marry is determined by the law of each of the parties severally. It has been said that a reference to the law of the husband will suffice (compare Savigny, "*System*," viii, p. 326; Gerber, "*D. Pr. R.*," § 32) as the relation has its seat at the place where the marriage is consummated. However, no such seat exists until the marriage has been consummated. An unmarried woman is not subject to the same system of law as that of her prospective husband and has equal rights with him. Further than this, however, it is a question of status.

Without refining too much, it results that an attempt to annul the marriage on account of duress, mistake, or fraud is to be judged by the law that each of the parties were severally subject to before marriage. Here (in contradistinction to issues within the law of obligations), the law applicable to the whole transaction does not govern. A marriage contract is a peculiar one, and therefore reference cannot be had to either the law of the place where the minds of the parties met, or to the law of the first matrimonial domicile. This view is also supported by von Bar (i, pp. 459-460). The same standard, *i.e.* the respective personal laws of the parties, governs the question whether there has been a valid waiver of rights growing out of the lack of consensus (compare Mugdan and Falkmann, "*Die Rechtssprechung der Oberlandesgerichte auf dem Gebiete des Civilrechts*" (1900), i, p. 350). *Contra*, however, is the view of the German Imperial Court, xxvii, p. 229. This court holds the law of the first matrimonial domicile to be authoritative, "as it determines the requisites to a valid marriage and whether a disability to marry exists" (see further, xlii, p. 339).

2. The main principle as above stated has been enacted in Art. 13, Introductory Act (Germany), which is as follows :—

“Entrance into marriage is judged according to the law of the state to which each of the betrothed parties severally belong, provided only one of them be a German. This applies also to aliens entering into marriage in the inland.”

However, this is to be taken in connection with Art. 27 (compare § 7, iii. 2, *supra*) by virtue of which, in Germany, the capacity of aliens to marry is under certain circumstances judged also by German law (A. Meyerowitz, “*Die Eheschliessung*,” in *Zeitschrift für internat. Privat- und Strafrecht*, x, 1).

3. The Italian law provides (Art. 102, *Cod. Civ.*):—

“The capacity of aliens to contract marriage is determined by the laws of the country to which they belong.

“The alien is, however, subjected to such disabilities as are provided in § 2, chap. i, of this title.”

Accordingly, an alien marrying in Italy is subjected to the *lex patriæ* in regard to his capacity, although by the rule cited he is also subject to Italian law upon the question of certain disabilities. Thus, for instance, even though he has reached the age of marriage according to the *lex patriæ*, he cannot marry if he has not reached the age fixed by the law of Italy. This is a rather extreme limitation.

II. *A completely contrary standard is set up by the law of England and America; here the capacity to marry and its form of solemnization is governed by the law of the place where the marriage is performed.*

1. In the United States, the conception of marriage is territorial. The doctrine of a natural right to marry prevails. Wharton (§ 165) attempts to bring the territorial standard into harmony with the Continental European doctrine upon status, in that he refers to the well-known limitation upon the application of foreign law : “By the codes of their states (France, Italy, Belgium) the personal law of foreigners does not operate when conflicting with territorial public order and good morals. And nothing so closely concerns public order and good morals as the conditions of the marriage tie.”

2. The territorial point of view also prevails in England, although since 1877 the law of domicile has been given more and more effect (Westlake, “*Treatise*,” § 21; Dicey, “*Le statut per-*

sonnel," ii, pp. 1-5). The tendency to change has been brought about by marriages performed abroad between English subjects and their deceased wives' sisters.

3. In the United States it is declared that a marriage validly entered into according to the law of the place where it was performed, is valid everywhere; accordingly, neither the national nor the domiciliary law is referred to. An "*agere in fraudem legis domesticæ*" is not taken account of. [The draft of the American Bar Association, however, contains a provision invalidating marriages entered into abroad in order to avoid the domestic law (4 *Columbia Law Review*, pp. 243, 246). — *Trans.*]

Kent ("Commentaries on American Law," 12th ed., by Holmes, vol. ii, p. 92) says:—

"As the law of marriage is a part of the *jus gentium*, the general rule undoubtedly is, that a marriage, valid or void by the law of the place where it is celebrated, is valid or void everywhere."

At p. 93:—

"The principle is, that in respect to marriage, the *lex loci contractus* prevails over the *lex domicilii*, as being the safer rule, and one dictated by just and enlightened views of international jurisprudence."

And further:—

"... it was held that the marriage must be deemed valid, if it be valid according to the laws of the place where it was contracted, notwithstanding the parties went into the other state with an intention to evade the laws of their own. It was admitted that the doctrine was repugnant to the general principles of law relating to other contracts; but it was adopted in the case of marriage, on grounds of policy, with a view to prevent the public mischief and the disastrous consequences which would result from holding such marriages void."

4. A similar doctrine is contained in the Argentine statute relating to civil marriages. Art. 2 provides:—

The validity of a marriage to which there are no impediments as provided by §§ 1-6 of Art. 9 shall be judged within the territory of the Republic by the law of the country where it was performed, *even though the parties left their domicile in order to escape the conditions as to form provided by its laws.*

III. *Some exceptional systems.*

1. The system of law prevailing in Russia contains an extreme doctrine of national law. Marriages of orthodox Russian subjects, even when performed abroad, must comply with all the requisites of the orthodox Greek Church. In order to meet this provision, the Hague treaty upon marriage was so drawn as to permit the rule to remain in force *on Russian territory*. This concession did not suffice, however, as Russia demands that unless it is in compliance with its laws, the marriage shall be regarded *everywhere* as invalid. It therefore has not joined the convention (see Art. 5, Appendix I).

2. Art. 31 of the Swiss Fed. Stat. upon Civil Relations provides as follows:—

“If the bridegroom be a foreigner, publication of the banns may only take place upon presentation of a certificate by the competent foreign official recognizing the marriage with all its results.

“The cantonal governments are empowered to dispense with this provision, and to replace this certification, if lacking, by some other appropriate regulation.”

The effect of this is that an alien male cannot be married in Switzerland unless his native country issues a certificate satisfying the statute. Cantonal dispensation is seldom granted. Most of the countries of Europe grant certificates satisfying the statute, but England and the United States do not, as there are no officials competent to do so.

IV. *Legislative reflections.*

To make the question of the capacity to marry dependent solely upon the law of the place where the parties happen to be, or to which they momentarily go for the purpose of marrying, certainly has the advantage of simplicity. Its advisability is doubtful, however, especially in view of the precedent of *Gretna Green*, or Scotch marriages.

B. *The Form of the Marriage Ceremony*

The maxim “locus regit actum” generally applies to the form of marriage ceremonies. There are exceptions to the rule, however, as a particular religious ceremony is regarded in some countries as an indispensable requisite for the validity of a marriage.

1. Austria demands that marriages of subjects shall be performed according to the laws of the church to which the parties belong.

2. Russia and Greece do not recognize a civil marriage of their orthodox subjects unless followed by a religious ceremony of the orthodox Greek Church (*Bulletin de la Soc. de legis. comparée*, xxvii, 1896, p. 164).

C. The Effects of Marriage

The determination of the scope and effect of the relations created by marriage is governed by the personal law of the husband.

1. The laws are *objectively* binding in regard to these questions; it does not lie within the free will of the parties to regulate the effects of the union.

The widow and the divorced wife are subject to the personal law of the deceased or divorced husband, so far as concerns the right to enter into a new marriage (especially before a prohibitory period has expired) unless territorial rules otherwise provide.

2. The principle has only seldom been expressed by statute.

(a) The Argentine law upon civil marriage provides in Art. 3:—

“The personal rights and obligations of the spouses are governed by the laws of the Republic as long as they reside upon its territory, no matter where the marriage may have been contracted.”

(b) The International Conferences of The Hague have elaborated a draft upon the effects of marriage upon the status of the wife and children born before the marriage (*Actes*, 1900, p. 230).

D. Consular Marriages

E. Stocquart, “*Le privilège d’exterritorialité spécialement dans ses rapports avec la validité des mariages célébrés à l’ambassade ou au consulat*,” in *Revue de dr. i.*, xx, pp. 260–300.

Mariolle, in *Archiv für das öffentliche Recht*, xiii, p. 459.

1. Among the requisites required for a consular marriage are the following:—

(a) that the consul be empowered to perform the marriage by the law of the native country of the parties;

(b) that the parties, or at least one of them, belong to the country which the consul officially represents.

In countries where only religious marriages are permitted, it is often impossible for aliens to get married, except by consular intervention, because they do not belong to the particular faith obtaining there. Consular marriages are also necessary where the civil marriage of the foreign state would not be recognized in the home country.

2. Some states do not recognize marriages performed on their territory by foreign consuls. To this class belong :—

(a) Germany ;

(b) Switzerland.

In America and England

Capacity to Marry.—The rule followed in the United States as to the capacity to marry is strictly territorial, and determines capacity by the law of the place where the marriage is celebrated. It follows that when foreigners marry in America, who are capable according to the local law, though incapable according to their own personal law, their marriage will not be invalidated by such incapacity, even though the parties intentionally left their own Jurisdiction to avoid its laws (*Medway v. Needham*, 16 Mass. 157; *Van Storch v. Griffin*, 71 Pa. St. 240; *Simons v. Allen*, 33 Ill. App. 512; *Moore v. Hegeman*, 92 N.Y. 521). England, on the other hand, regards the capacity of the parties as a matter governed by their personal law. This accords with the Continental rule, it being remembered, however, that the standard of personal law is, in England, the domicile (*Sottomayor v. De Barros*, 3 P. D. 1; *Brook v. Brook*, 9 H. of L. Cases, 193). The converse of the American rule, to wit, that "where our own citizens, capable of marriage by our laws, marry abroad in a foreign country where they would be incapable of marriage if subjects, we will hold that such incapacity will not prevent us from recognizing their marriage as valid," has been maintained by Wharton (§ 127). But he cites no cases to support his theory, and there is, in fact, some authority to the contrary (*In re Hall*, 61 App. Div. N.Y. 266; *Webster v. Webster*, 58 N.H. 3; *Simonds v. Allen*, 33 Ill. App. 512). The English rule, on the other hand, is applied both ways (*Sottomayor v. De Barros*, *supra*).

Form of the Marriage Ceremony.—In both Jurisdictions the form of the marriage ceremony is governed by the rule of "*locus*

regit actum." But the rule is limited to the case of Christian marriage, and is not to be extended to ceremonies such as are in use among savage or unchristian races. The term "Christian marriages" does not refer to any particular religious ceremony, but implies a contract, the effect of which is to bind one man to one woman exclusively (*Brinkley v. Atty.-Gen.*, 1890, L. R. 15 Prob. Div. 76; *Bethel v. Bethel*, L. R. 38 Ch. Div. 220; *Roche v. Washington*, 19 Ind. 53; *Meister v. Moore*, 96 U.S. 76).

The rule is not necessarily imperative in regard to marriage. It is optional, at least where it is impossible to use the forms prevailing at the place of celebration, or repugnant to the religious convictions of the parties, or where these forms are not imposed on foreigners by the state prescribing them. In such cases, if the personal law of the parties recognize a consensual marriage, or marriage *per verba de præsenti*, the marriage will be considered valid, even though not conforming to the forms of the place of celebration (*Raynham v. Canton*, 3 Pick. 297; *Hynes v. McDermott*, 82 N.Y. 41, 91 N.Y. 451; *Redgrave v. Redgrave*, 38 Md. 93). As to the law in England, the rule was stated by Lord Eldon as follows, "When persons are married abroad, it is necessary to show that they were married according to the *lex loci*, or that they could not avail themselves of the *lex loci*, or that there was no *lex loci*" (*Cruise on Dignities*, 276; see also *Ruding v. Smith*, 2 Hagg. 390; *Lloyd v. Petitjean*, 2 Curt. 251; *Este v. Smyth*, 18 Beav. 112, 23 L. J. Ch. 705). Formalities which do not affect the capacity of the parties as inherent in themselves, as, for instance, the consent of the parents, are considered part of the ceremony and hence governed by the *lex loci* (*Simonin v. Mallac*, 2 S. & T. 67, 29 L. J. (P. & M.) 97).

Effects of Marriage upon Property. — See § 75, Supplement, *infra*.

Consular Marriages. — By act of Congress (U.S. St. at Large, 1860, § 31), consuls and consular agents are authorized to validate marriages solemnized in their presence by "persons who would be authorized to marry if residing in the District of Columbia." By instruction of the State Department, consuls are now forbidden to perform marriage ceremonies, and though in practice still "validating" marriages performed in their presence by the issuance of a certificate, the act has no effect upon the validity of the marriage

except in respect of citizens of the District of Columbia, as marriage is a municipal institution under the control of the States, so far as their own domiciled citizens are concerned.

The English statute of 1892 (54 and 55 Vict. c. 74) empowers ambassadors and consuls to perform marriages abroad in certain cases; but a statute of the British Parliament cannot make these marriages valid in the country where they are celebrated, and the necessity of passing statutes to legalize them in England is an indication that the extra-territoriality doctrine on which they rest was not recognized at common law.

A committee of the American Bar Association has elaborated a draft statute for the recognition of consular marriages where one of the parties is a citizen of any State or territory, with the recommendation that it be enacted by all the State legislatures (4 *Columbia Law Review*, 1904, pp. 243, 246).

§ 73. The Treaty upon Marriage elaborated by the Hague Conferences.

Guillaume, *Le mariage en droit international privé et la Conférence de la Haye* (1894).

Lainé, in *Journal de dr. i.*, xxi, p. 5; xxii, pp. 465, 734; 1901, xxviii, pp. 5, 13-35, 231-253.

Rapport de Renault, Actes, 1900, p. 166.

Keidel, "Das internationale Eherecht, etc.," in *Zeitschrift für internat. Privat- und Strafrecht*, vii, pp. 228-244.

The Hague International Conferences elaborated a treaty "to regulate the conflicts of law in regard to marriage." It has been already ratified by seven European nations, and indications have been given that others will also ratify it (see § 5, II, *supra*). Its provisions are printed in French and English at Appendix I.

I. *The treaty makes the national law govern the capacity to marry.*

As a result, the internal legislation of those nations which have limited the application of this rule in other ways than the treaty has done will be superseded within the treaty union.

II. *The treaty limits the general principle in a number of ways.*

1. If the national law regards a marriage as valid, if entered into according to the *lex domicilii* or the *lex loci celebrationis*, the requisites set up by the national law itself need not be complied with.

2. If the place of celebration forbids marriages within certain degrees of consanguinity, aliens will not be permitted to be married there, even though the national law would have permitted it. This provision is a rational limitation of the *lex patriæ*.

The Conferences have also provided for a practical means of reference to the *lex patriæ* (Art. 4). That is to say, proof of native law may take place either through certificate of the home officials, or of their diplomatic representatives; but even this may be modified so as to permit of baser means of proof, such as the mere oath of the party, provided the state wherein the marriage is to be celebrated is satisfied therewith (*e.g.* law of Denmark).

The proposed treaty further declares that every marriage must be recognized which was entered into according to the laws of the country where it took place. But a reservation is immediately added for those countries which demand a religious celebration. In addition, the provisions existing by the *lex patriæ* for the publication of banns must be observed; though if not, the marriage is not necessarily void *outside* of the national state.

III. *The treaty suffers from its too considerable limitations and reservations.*

§ 74. The Law of Marital Property.

v. Bar, i, p. 505.

Ricaud, *Des régimes matrimoniaux au point de vue de droit international privé* (Paris, 1886).

G. Pellis, *Du régime matrimonial des époux mariés sans contrat en droit international privé* (Lausanne, 1893).

K. Hasler, *Das eheliche Güterrecht im internationalen Privatrecht* (Zurich, 1897).

I. *In general.*

1. The primary question is whether the law of the domicile or of nationality shall govern; or should a combination take place, as, for instance:—

- (a) that the law of the first domicile shall govern the relations of the spouses *inter se*; and
- (b) that the law of the momentary domicile shall apply as against third persons.

It is important to determine whether antenuptial or postnuptial contracts between the spouses shall be accorded recognition internationally.

2. In general it may be said that the provisions with regard to marital property are closely allied with national customs and dispositions, and that, therefore, the *lex patriæ* may be looked upon as the rational standard in the first instance; by this is meant the law of the husband's nationality. The view is a rational one, especially when we remember that the husband has the choice of the domicile, and the national standard is therefore a check on too sudden an alteration of the property rights of the spouses.

3. Thus the important question in international life is whether the relations of the spouses as to property shall be altered by a change of domicile. Even Molinæus was engaged with this *quæstio famosissima*; contrary to Argentæus, he took the stand that even in the absence of a formal agreement, there was a tacit submission on the part of the spouses to the law of their domicile.

4. Arguments in favor of the *lex patriæ* and the changeableness of the law of marital property are as follows:—

- (a) that it is necessary in order to preserve the interests of the wife, otherwise they would be sacrificed to the husband's arbitrary will in his choice of domicile;
- (b) that their rights of property are partly determined by the law of succession;
- (c) that it has the advantage of certainty and permanency.

5. In favor of domiciliary law and changeableness it is argued:—

- (a) that public credit requires that all persons maintaining a household at a place shall, in general, be subject to the same local law;
- (b) that the national standard is impracticable, as it requires third persons to keep in mind all the various systems of marital property.

The latter reasoning undoubtedly influenced the proposed treaty of Lima (Art. 15), and also that of Montevideo (Art. 12).

6. Another method is to reconcile the two systems by settling accounts, as it were, before the change of domicile. This is the solution to be found in Argentine and in Louisiana. But it does not recommend itself in practice.

7. The doctrine of uniformity is *theoretically* correct. It is difficult to observe in practice, however, as even the nationality may change.

8. Much weight has been given to the law of the first domicile of the spouses; the act of settling there is taken as a tacit indication of the law which shall henceforth control. The first matrimonial domicile is that at which the spouses reside immediately after marriage. Where, for business reasons or differences between the spouses, the wife lives separately immediately after marriage, reference would eventually be made to the residence of the husband (*N. & A.*, Art. 19).

Difficulties may arise in fixing the first matrimonial domicile, e.g. where the spouses reside after marriage in a certain state for only a short time and then choose another domicile. If the new domicile was intended as such from the beginning, it ought to prevail as the matrimonial domicile.

II. *The rules prevailing in various countries.*

1. *Italy*

The national law governs without limitation here (*Disposizioni*, Art. 6: "*rapporti di famiglia*"). There is no distinction made between:—

- (a) Italians domiciled in foreign countries; and
- (b) aliens domiciled in Italy.

2. *Germany*

Germany also supports the doctrine of national law (Art. 15, Introductory Act), both in regard to:—

- (a) Germans domiciled in foreign countries; and to
- (b) aliens domiciled in Germany. But in case the national state itself does not support this principle, but that of domiciliary law, or any other system which would make German law applicable, German law will govern (Art. 27). Art. 7, however, does not apply (see *supra*, § 58, III, 1), and therefore the capacity to act of the spouses is governed by the *lex patriæ*.

Art. 16, Introductory Act, provides that § 1435 of the Civil Code shall apply to foreign spouses and to those who have acquired German citizenship since their marriage. This section of the Civil Code provides that if the right to the management or enjoyment of the marital estate by the husband has been taken away or altered by a marriage contract, the fact must either be known by third parties dealing with him, or else be registered in the register of

marital estates of the competent court, in order to be effectual as against such third parties.

3. *France*

The national law is not wholly disregarded, but in practice the courts tend to spell out a tacit contract between the spouses for the application of French law, whenever they have long been domiciled in France (*Journal de dr. i.*, xii, p. 558; "*Zeitschrift für internat. Privat- und Strafrecht*," v, p. 66). In other words, the property relations of foreign spouses is determined in France by the intention of the parties as proved. In this way the national law may also come to be taken as the standard.

Conversely, French spouses married in a foreign country and residing there for a long time are considered subject to domiciliary law if there are no special reasons to the contrary (*Journal*, xxviii, 1901, pp. 354-357). It will also be considered permanently applicable. A French woman, acquiring foreign citizenship by marriage to a foreigner, cannot lay claim to the application of the system of common property prevailing in France (*communauté légale*) merely because the marriage was celebrated in the Orient, where the husband had submitted himself to French protection (*id.*, p. 356).

A *hypothèque légale*, or mortgage by operation of law, given to married women and wards in France upon the property of husbands and guardians, is not recognized in favor of alien married women or alien wards, unless the right has been extended to them by treaty, or their national law itself contains the same institution (*Journal*, xxiii, p. 344; xxvii, p. 321; Roguin, "*Conflits*," No. 135). It is a "civil right," as this term is understood in France, and therefore it is not accorded to aliens (Art. 11, Civil Code).

Neither does the mortgage extend in favor of French women or French wards to immovables situated in a country where the system does not prevail. Vareilles-Sommières (ii, p. 330) states that there is a unanimity of opinion on this point. A difficult question, however, is whether the inalienability of the dower as provided by French law will accompany a French married woman everywhere as part of her status. Vareilles-Sommières (ii, p. 330) maintains that although it is part of her personal law, it will not apply to property situated in a country which permits it to be

alienated ; for this would contravene the purpose of the latter state to make such property subject to the uses of commerce.

4. *Argentine*

The Statute upon Marriage provides as follows :—

“ Art. 4. The marriage contract governs the property of the spouses, no matter what be the law of the place where the marriage was celebrated.

“ Art. 5. In the absence of contract, if the matrimonial domicile has not been changed, the law of the place where the marriage was celebrated governs the movable property of the spouses, wheresoever situated and wheresoever acquired. If the matrimonial domicile has been changed, the property acquired before the change shall be governed by the law of the old domicile ; that acquired after, by the new.

“ Art. 6. Immovables are governed by the law of the place where they are situated.”

5. *Switzerland*

A sharp distinction is made between :—

- (a) the law relating to the spouses *inter se* ; and
- (b) the law governing their property relations as against third persons.

The law of the first matrimonial domicile governs the property rights of the spouses *inter se*, during the whole period of the marriage (Art. 19, *N. & A.*). The spouses may, however, make the law of a new domicile applicable by filing a joint declaration to that effect. The declaration requires official ratification (Art. 20). The same system of law governs also nuptial contracts.

Where the rights of third persons are involved, the property relations of the spouses are governed by their law of their momentary domicile (Art. 19₂).

It is clear that curious relations may result from the distinction. Thus, the spouses might be living under separate rights of property by virtue of the law of the matrimonial domicile, while at the same time the wife might be liable for the husband's debts under that of the momentary domicile. This is palpably unfair.

Swiss spouses having had their first matrimonial domicile abroad are governed by their *lex originis* in regard to their property relations, unless the law of the particular foreign state is

applicable by its own terms (Art. 31₁). When the spouses return to take up domicile in Switzerland again, their property relations, whatever they may have been, continue. They are permitted, however, to make the declaration (see *supra*) provided by Art. 20 and thus change their relations (Art. 31₃).

§ 75. The Law of Marital Property in America and England.

The sharp separation of movables from immovables made throughout the private law of these Jurisdictions results here in determining the property rights of the spouses by different standards of law, according as they are in movables or immovables.

The rights of the spouses in respect of movables is governed by the law of the first matrimonial domicile. Westlake says (§ 36):—

“In the absence of express contract, the law of the matrimonial domicile regulates the rights of the husband and wife in the movable property belonging to either of them at the time of the marriage, or acquired by either of them during the marriage. By the matrimonial domicile is to be understood that of the *husband at the date of the marriage*, with a possible exception in favor of any other which may have been acquired immediately after the marriage, in pursuance of an agreement to that effect made before it.”

This was not always the standard. For a time, the place of celebrating the marriage was looked upon as authoritative, because the performance of the contract of marriage was regarded as having taken place there (Story, § 158). But this theory has been abandoned in both countries (*Davenport v. Karnes*, 70 Ill. 465; *Collis v. Hector*, L. R. 19 Eq. 334). In *Gleitsmann v. Gleitsmann* (1901), 60 N.Y. App. Div. 371, the parties were married in Germany, removed to Maryland, where they intended to establish their matrimonial domicile, and at the time of the action were domiciled in New York. The law of Maryland was held authoritative. Thus, as to property acquired before marriage, the rights of the wife have vested and cannot be affected by any subsequent act of the husband (*Bonati v. Welsh*, 24 N.Y. 157; *Kendall v. Coons*, 1 Bush (Ky.), 530). But when the matrimonial domicile has been abandoned and a new one acquired, acquisitions subsequent to the change will be governed by the law of the new domicile (*Davis v. Zimmermann*, 6 Pa. St. 70; *Clanton v. Barnes*, 50 Ala. 260; *Fuss v. Fuss*, 24 Wisc. 256). On the other hand, even though the

property has been acquired subsequent to the marriage, if it was acquired prior to the change of domicile and has vested in husband or wife according to that law, it will not be divested by removal to another state (*Bond v. Cummings*, 70 Me. 125; *Kraemer v. Kraemer*, 52 Cal. 302; *Lichtenberger v. Graham*, 50 Ind. 288).

Marriage settlements are also governed by the law of the matrimonial domicile (*Anstruther v. Adair*, 2 M. & K. (Eng.) 513; *Bank v. Lee*, 13 Pet. 107). The Supreme Court has decided that an antenuptial contract, valid according to the law of the matrimonial domicile where the property then was, will be binding against creditors and purchasers after the property has been removed to another state (*De Lane v. Moore*, 14 How. U.S. 253).

A provision in a marriage contract making a system of law other than that of the matrimonial domicile authoritative has been held valid in England (*Este v. Smyth*, 18 Beavan, 112). There is an American decision to the contrary (*Bourcier v. Lanesse*, 3 Martin (La.), 587). A recent English decision goes so far as to say that "it is not necessary that there should be an express stipulation. It is sufficient if the court arrives at the conclusion that the parties in fact contracted with reference to some law other than that of the matrimonial domicile" (*Cozens-Hardy*, L. J., in *In re Fitzgerald*, 1904, 90 L. T. Rep. 266, 270).

The rights of the spouses in regard to immovables are, of course, governed by the lex rei sitæ (*Besse v. Pollochoux*, 73 Ill. 285).

The property relations of the spouses, so far as they affect the rights of third parties with whom they have entered into obligations, are governed by the system of law authoritative upon the particular obligation on which the third party relies. Where the law of a foreign state provides that the expenses of the family are chargeable on the property of both husband and wife, a creditor whose obligation was entered into in that state, while the spouses were domiciled there, may rely upon the provisions of that law, in a state where such a liability does not exist (*Matthews v. Dickinson*, 1901, 73 N.Y. Supp. 190).

§ 76. Legislative Reflections upon the Law of Marital Property.

1. The Institute of International Law proposed certain provisions upon the property relations of the spouses in its "*Règlement*" upon marriage and divorce (1888, Arts. 12-15). Art. 15 provides:—

"A change of domicile or of nationality of the spouses or of the husband does not change the relations of the spouses, once they are established, saving the rights of third persons."

2. The government of the Netherlands proposed a draft treaty "concerning the effects of marriage upon the property of the spouses" (*Actes*, 1900, p. 230). It was referred to the Hague Conference of 1900. Its committee proposed certain amendments, but no definite action has been taken as yet. It will probably be taken up at some future Conference.

3. I would suggest that where a contract has been executed, it should be taken as the primary standard both *inter se* and as against third persons, the contract to be interpreted by the national law of the husband. If no contract is executed, the national law of the husband should itself control.

In both cases, a declaration should be filed and published by a registering official of the domicile, to the effect that the relations as established by the contract, or by the national law, is intended to govern. If this be not done within a certain period, the domiciliary law shall govern as against third persons. Their interests should be paramount. A property register for alien spouses is therefore advisable for recording, not only marriage contracts, but also the provisions of the national law. I would also put into practice the suggestion of the Institute upon capacity to act (see *supra*, § 64, ii, 2), viz. that if a party prove that he was led by either of the spouses into a mistaken belief that their relations *inter se* were the same as created by domiciliary law, he will be permitted to rely on that law, even though a marriage contract or the national law has provided other property relations.

§ 77. Divorce.

I. *In general.*

1. The complete dissolution of the bond of marriage (*divortium*) is granted by the laws of Germany, France (since 1884), Belgium, Netherlands, Denmark, Norway, Sweden, Switzerland, England, and the United States. It is not recognized by the laws of Austria, Italy, Spain, and Portugal, which accord only a separation *de corps*. In Russia, only religious divorce is recognized. In some countries there are institutions existing side by side with absolute

divorce. Thus, in Germany there is also a proceeding dissolving "the community of marriage."

2. The law of divorce is particularly complicated in international matters because :—

- (a) a decree of divorce, differing from other decrees, intends to and does effectuate a new legal relationship ;
- (b) it affects the *status* in the broader sense, and therefore there is a tendency to regard the national courts as alone competent ;
- (c) public policy is involved ;
- (d) the laws vary, not only in regard to the *permissibility* of divorce, but also in regard to the *grounds* of divorce.

It is a general principle of the law that a married woman acquires the nationality of the husband ; this is true now even in Turkey, Holland, England, and the United States. The wife also follows the domicile of the husband.

II. *Whether aliens may maintain an action of divorce and the grounds variously established as authoritative.*

1. As a rule we may say that the internal state will grant a divorce to alien subjects only when it itself recognizes divorce as an institute of the law.

In Italy alone, curiously enough, it has several times been declared that aliens domiciled there may be divorced if the personal statute of the husband (*lex patriæ*) permits of it. The *Cour d'Ancona* granted an absolute divorce to a German from an Italian woman who had abandoned him and gone to America. The opinion of the court, of date March 12, 1884, states :—

"As divorce cannot be considered absolutely contrary to public order and good morals, it should be granted if the *lex patriæ* permits it, as according to the Italian Civil Code, the relations of the family are governed by personal law."

The most celebrated jurists of Italy protested against this decision (Pasquale Fiore, "*Diritto int. priv.*," 3d ed., ii, No. 688). Fedozzi says (*Journal de dr. i.*, xxiv, 1897, p. 499) that the case cited was the only case of its kind. Nevertheless a similar decision was again rendered by the *Tribunal de Milan* in 1887 (*Journal de dr. i.*, xxvi, p. 409; *Zeitschrift für internat. Privat- und Strafrecht*, ix, p. 413). The court based its decision upon the decision of the Court of Ancona of 1884, and upon the opinion of Contuzzi

("Diritto int. priv.," pp. 167-169), and remarked that the view was "well established" in Italian law.

2. In all states, the laws relating to divorce, especially in regard to the grounds for divorce, are regarded as being of a strictly coercive character (*A. E.*, iv., p. 669). The Swiss Federal Court in the case cited says:—

"From whatever point of view the (internal) law regards this matter, its provisions relative to an institution (divorce) the most important in its bearing upon human society, assume a character imperatively affecting public order, and therefore are exclusively binding upon the judicial authority of the state which has established them."

3. It has frequently been decided in France that actions of divorce by resident aliens may be heard before French courts, when any other forum, particularly that of the home state, is lacking to the parties (*Journal*, xx, pp. 370-374). In a divorce action brought by an Englishman it was said that it was a question of personal statute governed by the *lex patriæ* even in regard to the grounds of divorce; and that therefore the French courts could grant the divorce only if an English court would do so in a similar case (*Journal*, xxvi, 1899, pp. 360-363).

4. German law enacts two propositions:—

(a) The question whether an action of divorce is *maintainable* is determined by the *lex patriæ* of the husband. Art. 17, Introd. Act, provides:—

"The law of that state shall be authoritative upon the dissolution of the marriage, to which the husband belonged at the time of commencing the action."

A divorce may be granted to alien spouses in Germany only when the foreign law recognizes the institute of absolute divorce. But the *lex patriæ* will not be applied if it itself declares the German law authoritative (Art. 27, Imp. Ct., vol. 47, p. 136).

(b) The question as to what *grounds* shall decide whether a divorce or separation of the community of the marriage tie *shall be granted*, is determined by Art. 17, which states that the grounds relied upon must be recognized by both the national and the German law.

It follows that the marriage of Austrians, Italians, or Spaniards, though domiciled in Germany, cannot be dissolved there.

The institute of dissolving the community of the marriage tie

(§§ 1575-1576, German Civil Code) is not identical with separation from bed and board. It leaves the bond of marriage untouched, but a subsequent action may be brought later for absolute divorce. It is a divorce conditioned suspensively and potentially (Dec. of Imp. Ct., April 30, 1901). Under the provision of the German law (*supra*), subjects of Spain, Portugal, or Italy can neither be absolutely divorced nor can they demand the dissolution of the community; for this conception of German law, though similar, does not *coincide* with that of the *séparation de corps et de biens*.

III. *Upon the civil legal effects of a divorce, the law of that country is controlling which has jurisdiction to grant the divorce.*

This applies to the following questions:—

1. the control of the children and the conditions under which the parent may have the right to see them;
2. the question of alimony and other contributions to the support of the wife;
3. the question of damages to the innocent party and the prohibition to remarry (*Zeitschrift für internat. Privat- und Strafrecht*, ix, pp. 382-395);
4. whether testamentary rights, a mutual contract for succession, or other benefits arranged by way of marriage settlement become inoperative where positive legislation does not otherwise declare.

The Swiss Federal Statute regulating marriage provides:—

“The further effects of the divorce or separation from bed and board, upon the personal rights of the spouses, their property relations, training and education of the children, and damages to be awarded against the guilty party are governed by the law of the canton to whose jurisdiction the husband is subject.”

See also §§ 142 and 150, *infra*.

In America and England

Jurisdiction in matters of divorce is, in general, dependent upon the domicile of the parties at the time the action is commenced. It will be remembered that the legal domicile of husband and wife are identical, as that of the latter will follow the one chosen by the former. The older cases in England pointed toward a rule making the *lex loci celebrationis* authoritative, but this has now been abro-

gated (*Wilson v. Wilson*, L. R. 2 P. D. 435; *Shaw v. Gould*, L. R. 3 H. L. 55; *Watkins v. Watkins*, 135 Mass. 83; *Platts App.*, 80 Pa. St. 501; *McShane v. McShane*, 45 N.J. Eq. 341).

Statutes in some of the States have enacted other grounds of jurisdiction besides that of the domicile of the parties. Thus, in New York (§ 1756, Code Civ. Proc.), an action of divorce may also be maintained if the parties were married within the State, or if both were resident at the time the offence was committed. Where such statutes use the term "residence," it is usually construed to mean domicile (*De Meli v. De Meli*, 120 N.Y. 485; *McShane v. McShane*, cited *supra*). The statutes permit the wife to acquire such domicile separate from that of the husband for the purposes of the divorce (§ 1768, N.Y. Code Civ. Proc.). But even in England, where no such statute exists, a separate domicile of the wife will be recognized if it be necessary to prevent the husband from taking advantage of his own wrong, provided such separate domicile be acquired in a country where the marriage has subsisted at some time or another (*In re Redding*, 1888, Ct. of Sessions Reps., 4th ser., xiv, p. 1102; *Deck v. Deck*, 2 Sw. & Tr. 90). For other standards of jurisdiction, confer Supplement to § 43, *supra*.

Notwithstanding that each State has the right to lay down such a standard as it pleases to give its own courts jurisdiction in matters of divorce, it does not follow that the decree will be recognized in other States. Thus it is well settled that a divorce granted upon a residence short of a *bona fide* domicile will not be binding extra-territorially (*Leith v. Leith*, 39 N.H. 20; *Coddington v. Coddington*, 20 N.J. Eq. 263). The courts of New York have been especially strict in applying the rule (*Williams v. Williams*, 130 N.Y. 193; *Cross v. Cross*, 108 N.Y. 628; *O'Dea v. O'Dea*, 101 N.Y. 23).

English courts arrive at the same result by a different route. In a recent English case, it is decided that where the jurisdiction exercised is in accordance with the principles of International Law, the decree ought to be respected by the tribunals of every civilized country; but where it is derived solely from some rule of the municipal law of the particular country, it cannot claim extra-territorial authority, if it trenches upon the interests of any other country to whose tribunals the spouses are amenable (*Le Mesurier v. Le Mesurier*, 64 L. J. P. C. 97).

The question of jurisdiction is of all importance in matters of divorce because, in America and in England, divorce is considered strictly a matter of morals and national policy, and therefore each court is bound to regard its own legislation as supreme in determining the grounds for the action. This is in line with the view supported by our author and other Continental authorities (*e.g.* Savigny), that the laws relating to divorce are of a distinctly positive and coercive character. See the remarks of Sewell J. in *Barber v. Root*, 10 Mass. 265, and *Harvey v. Farnie*, 42 L. T. Rep. 482.

Actions to annul marriages are based entirely upon statute. In England, the court has jurisdiction to entertain a suit for the annulment of any existing marriage celebrated in England (Matrimonial Causes Act (20 and 21 Vict. c. 85); *Simonin v. Mallac*, 2 Sw. & Tr. 67). In America, the statutes do not usually contain special requisites for jurisdiction (*e.g.* § 1742, N.Y. Code Civ. Proc.), but the courts have in practice reached the same result as the English statutory rule. In *Becker v. Becker* (1901), 58 App. Div. N.Y. 374, it is said :—

“Inasmuch as no reference is made to residence in actions to annul a marriage, while residence within the state of at least one of the parties is required in actions for the divorce (except in the one instance specified) and for separation, the legislature, in a carefully prepared and elaborated scheme of matrimonial action, intended, in actions to annul a marriage contracted within the state, to confer jurisdiction upon the courts to adjudicate as to the validity of the contract, irrespective of the residence of the parties.”

The Committee on Uniform State Laws of the American Bar Association has elaborated (1899) a draft for a uniform statute upon “Divorce Procedure and Divorce from the Bond of Marriage.” It has not as yet been adopted by the legislature of any State (A. M. Eaton, “Reforms in Marriage and Divorce Laws,” in *Columbia Law Review*, April, 1904, pp. 243, 252).

§ 78. The Swiss Law of Conflict in Matters of Divorce.

An unsound solution of a conflict of law frequently produces results that are nothing short of bizarre. A most peculiar legal situation is presented by the Swiss system of divorce, and, as it is entirely unique, we discuss it under a separate head.

I. *In general.*

1. The Federal Statute upon Civil Relations and Marriage accords a right to a divorce in favor of an innocent party upon certain grounds; among others, for insanity if the insanity has continued for at least three years and has been declared incurable. There is also an action for divorce by mutual request under Art. 54.

2. An absolute right to a separation as distinguished from divorce is not given by the statute for any particular cause, but the judge may grant a temporary divorce, for not more than two years, within his discretion (Art. 47).

3. Switzerland does not recognize the institute of separation unlimited as to time, even for the subjects of those states in which it exists, and even though they satisfy the provision of Art. 56 to be mentioned hereafter (*A. E.*, iv, p. 669).

II. *In particular.*

A. Divorce of aliens domiciled in Switzerland.

Art. 56 of the Federal Statute upon Civil Relations and Marriage provides:—

“An action for divorce or for annulment of marriage between aliens may be heard by the courts only upon proof that the country to which the spouses belong will recognize the judgment that may be issued.”

This provision arose primarily from a desire to provide a right of divorce in Swiss courts for alien residents, but seldom has there been a statutory provision which so entirely missed its purpose as Art. 56.

1. The Swiss courts hold that a certificate of recognition from the foreign state is unnecessary, provided that it may be developed from the legislation and practice of that state that a divorce decreed at the domicile of the spouses will and must be recognized without a re-examination of the proceedings (*A. E.*, v, p. 264; xv, p. 125; x, p. 483; *Journal de dr. i.*, xxv, p. 291). In this way, Belgian subjects have been granted a divorce at Geneva (*Journal*, xxv, p. 191).

On the other hand, Art. 56 is not complied with simply by obtaining a certificate from a Swiss consul. The Swiss consul at St. Louis executed a certificate at the request of an American citizen (domiciled in Zurich) to the effect that, according to the laws in force there, no such declaration as Art. 56 requires can be obtained. It also stated “that if the plaintiff be divorced there (Zurich) upon

valid grounds, no one will be concerned about it here (St. Louis), and he may, without hesitation, enter into a new marriage if authorized by an official decree of divorce." The courts of Zurich properly decided that the proof required by the statute was not forthcoming. Neither will a general declaration by the embassy of the foreign state suffice, which declares that the judgment would probably be recognized (*Journal*, xiv, p. 375).

2. The following countries refuse to give certificates of recognition as required by Art. 56:—

- (a) France (*A. E.*, iv, p. 668; *Bundesb.*, 1884, ii, p. 743).
- (b) Austria (*H. E.*, v, p. 156).
- (c) Russia will, under no circumstances, recognize the divorce of its subjects of orthodox Greek faith by foreign courts (Martens, in *Journal*, v, p. 142).
- (d) Servia (*Bundesb.*, 1887, ii, p. 664).
- (e) Great Britain, as a declaration by the governmental authorities would have no binding effect upon the courts.
- (f) United States of America, for the same reason (see *H. E.*, viii).
- (g) Italy, Spain, and Portugal do not recognize foreign divorces granted to their Catholic subjects.
- (h) Germany (*H. E.*, xix, p. 94; *A. E.*, xxvi, pt. 1, p. 219; *Bundesb.*, 1901, iii, p. 541). Art. 18 of the Introductory Act provides that foreign divorces shall be recognized only if grounds existed both according to the foreign and the domestic law; as this fact cannot be certified in advance, the German government cannot comply with the requirements of the statute. Again, § 328 of the Rules in Civil Cases prevents recognition from being accorded a foreign divorce in the event that foreign law, instead of German law, has been applied "to the detriment of a party."

Formerly there was no forum provided by the laws of Germany for the divorce of German citizens domiciled abroad. This has lately been remedied by § 606 of the Rules in Civil Cases.

3. A suit for an absolute divorce after a temporary divorce has been granted is regarded as the bringing of an entirely new action. A new declaration must be obtained from the particular foreign state (*A. E.*, x, p. 482).

4. As Art. 56 speaks of "marriages between aliens," it presupposes that both spouses are aliens. In Zurich, it has been decided that an action for divorce may be brought there by a Swiss woman against her husband, although he was domiciled in the United States and had become an American citizen by naturaliza-

tion. It is true that this act also naturalized the wife, but her release from Swiss citizenship had not been decreed as required by Swiss law (see § 44, II, 2, *supra*). Neither is the competency of the Swiss courts dissolved because the husband has also brought an action for divorce in the United States. The Appellate Court of Zurich held that, notwithstanding the possibility of conflict, the jurisdiction of the home state must be guaranteed to every Swiss citizen (*H. E.*, xviii, pp. 218, 232).

B. Divorce of Swiss subjects domiciled abroad.

1. Foreign decrees of divorce will not be recognized in Switzerland as between Swiss spouses, as the Swiss Federal Council regards Art. 43, Fed. Stat. Civ. Rel. and Marriage, as making the home forum exclusive (*B.*, 1888, ii, p. 774, No. 27, p. 775, No. 28). The Federal Court has declared that Switzerland is under no legal duty to recognize foreign decrees of divorce (*A. E.* xv, p. 126). Art. 43 provides:—

“Actions for divorce and for the annulment of a marriage must be brought before the court of the domicile of the husband.

“In the event of abandoning domicile in Switzerland, the action may be brought at the place of origin (citizenship) or the last domicile of the husband in Switzerland.”

The Federal Court, in its interpretation of Art. 43, stated as follows (*A. E.* xv, p. 126):—

“Even if it be not true that Swiss spouses, though they be living abroad, are by law exclusively subject to Swiss jurisdiction in matters of divorce, yet Art. 43 does not provide that foreign decrees must be executed by the cantons.”

The commission of the *Ständerat* (Fed. Senate) constituted to inquire into the condition of affairs apropos of an American decree of divorce which was refused recognition in Switzerland, expressed itself as follows (*B.*, 1888, iii, p. 249):—

“Without wishing to oppose, upon principle, this decision of the Federal Council, we must nevertheless express the wish that the same be not inalterable, and that the Council reconsider the matter in view of the difficulties caused to international relations and the hardship involved upon so many of our countrymen in America.”

The Civil Court of Bâle has lately held that a divorce issued to Swiss spouses in Germany should be recognized in Switzerland,

and that Art. 43 did not establish an exclusive forum. Assuming that the officials of the civil bureau refused to register the divorce, still, the parties could remarry again in Germany, and these same officials might be compelled to enter two marriages of parties not divorced in the eyes of the Swiss law. This new picture of Swiss judicature brings to light a highly precarious situation (*Zeitschrift für internat. Privat- und Strafrecht*, x, p. 86; see also *B.*, 1897, i, p. 372).

2. The condition of law whereby foreign decrees of divorce between Swiss spouses are regarded as absolutely forbidden, is clearly unsatisfactory. It should be made possible to apply, internationally, the method once adopted in the concordat of 1821, whereby the home state could, either by treaty or under the proper circumstances, delegate its jurisdiction.

§ 79. The Bauffremont-Bibesco Affair.

Bluntschli, *Deutsche Naturalisation einer separierten Französin und Wirkungen der Naturalisation. Beleuchtung einer Frage des internationalen Rechts* (Heidelberg, 1876).

De Mauro, *Questione di diritto internazionale privato: se una donna francese separata di persona col marito può farsi naturalizzare senza autorizzazione in paese straniero, in ispecie in Germania, e contrarvi un secondo matrimonio. Lettera al barone Holtzendorff* (Catania, 1876).

De Folleville, *Un mot sur le procès de madame la princesse de Bauffremont, aujourd'hui princesse Bibesco* (Paris, 1876).

C. F. Gabba, *Il secondo matrimonio della principessa di Bauffremont et il diritto internazionale. Monitore dei Tribunali*, xviii.

v. Holtzendorff, *Der Rechtsfall der Fürstin Bibesco (früheren Fürstin Bauffremont). Ein Gutachten* (Munich, 1876).

A. Stölzel, *Wiederverheiratung eines beständig von Tisch und Bett getrennten Ehegatten* (Berlin, 1876).

A. Teichmann, *Étude sur l'affaire de Bauffremont, envisagée au point de vue des législations française et allemande* (Bâle, 1876).

Rolin, *Mémoire pour le prince et la princesse Bibesco* (Brussels, 1880).

I. Of particular interest from the point of view of international conflict is the case which arose from the naturalization of a separated French woman and her subsequent remarriage. The case attracted great attention at the time and led to an amendment of the law in France.

The Countess of Caraman, a Belgian, was married to the French Prince Bauffremont. In 1874, the French courts granted a "*séparation de corps et de biens*." The princess then removed her domicile to Germany, where, in 1875, she acquired citizenship in the

Duchy of Saxe-Altenburg. In the same year she entered into a second marriage with Prince Bibesco of Roumania, at Berlin, as permitted by German law. The question arose as to the validity of this marriage.

The following grounds were urged in favor of its validity : —

1. Naturalization is an act of public law and only the officials of the naturalizing state have the power to determine its validity (Bluntschli).

2. A *femme séparée* has the right to choose her nationality in the same manner as she is permitted to choose her domicile (de Folleville).

In this connection it was cited that under the old French law, an innocent *femme séparée* could enter a cloister without the authorization of her husband. Naturalization is an act less radical in its effects and therefore should likewise be permitted. As she can choose a foreign domicile, why should she not be permitted to naturalize there? The continuance of the authority of the husband contradicts the very nature of a separation and merely serves as an opportunity to the husband to give vent to his passion and hatred.

That by virtue of the naturalization, the rights of the princess in personal matters became determinable by the laws of Germany. Such limitations as the French law enacts, therefore, cease (Holtendorff).

On the other hand, it was argued by Stölzel in Berlin and by Teichmann in Bâle that the second marriage was void both by German and by French law, and it was, in fact, so held by the French courts in 1886 (Civil Tribunal of the Seine, August 16), although the Belgian tribunals refused to recognize the penalties imposed by this decree (*Journal*, ix, p. 364).

II. On February 6, 1893, a statute was passed in France by which a wife separated from bed and board no longer remains under the authority of the husband. This act provides (amending Art. 311, *Code civ.*):—

“A *séparation de corps* always includes a *séparation de biens*. It has further the effect of giving to the wife the full exercise of her civil capacity, without the necessity of obtaining the assent of the husband or of the court.”

Compare *Journal*, xx, p. 1135.

§ 80. The Treaty of the Hague Conferences relating to Divorce.

Rapport Renault, Actes, 1900, p. 207.

The treaty to regulate "the conflict of laws and of jurisdictions in the matter of divorce and separation" (reprinted in French with an English translation at Appendix II) has been referred to the governments of the powers that participated in the Third Conference. It has already been ratified by seven European nations (§ 5, II, *supra*).

The following comments suggest themselves:—

I. Theoretically, four different solutions are possible, viz.:—

1. the *judex domicilii* and the *lex domicilii*;
2. the *judex domicilii* and the *lex patriæ*;
3. the *judex domicilii* and the application of the grounds of divorce provided for by both the law of the domicile and of the national state provided they agree;
4. the *judex patriæ* and the *lex patriæ*.

The proposition which I consider as the sound solution originates with the Institute of International Law. In its "Regulation of the international conflicts of law in matters of marriage and divorce" there are two paragraphs to the following effect:—

"Art. 17. The question whether a divorce is legally admissible or not depends upon the national law of the spouses.

"Art. 18. If the divorce is admitted upon principle by the national law, the grounds for the same must be those recognized by the law of the place where the action is brought.

"A divorce thus decreed by the competent tribunal shall be recognized everywhere."

In my opinion the solution proposed by the Institute affords an excellent reconciliation between the two principles struggling for supremacy in the international field, and from this point of view seems to me most acceptable.

The arguments in favor of this view are preponderating; the advantages embraced by it are as follows:—

- (a) Recognition is given to the close connection existing between the individual and the home state, while at the same time giving due importance to the law of the domicile.
- (b) The great preliminary question is whether the national law permits of divorce or not,—the particular grounds for divorce are comparatively a detail, or of secondary significance. The

Catholic view of the marriage relation is, in this way, protected too, as actions of divorce by subjects of Catholic countries could no longer be founded solely upon domiciliary law in Protestant territory.

- (c) The solution of the Institute is both practical and ingenious for the reason that the judge is not thus unnecessarily required to apply law strange to him.

A proposition has also been advanced for the establishment of an international tribunal for the determination of marriage questions arising in International Private Law. See von Bar, i, pp. 502–504. This idea is, without doubt, a chimera to which the countries of the world will never agree. I need not say that I have no sympathy with such fantastic plans. The proposition has been earnestly supported, however, by Lehr (*Journal*, xi, pp. 49–56): “*D'un projet de règlement international en matière de mariage.*” No one advanced it at The Hague, and the scheme may be looked upon as buried.

II. The Third International Conference did not accept the formula of the Institute, but proposed a new one instead (Art. 2).

1. The Second Conference demanded as a requisite for divorce an agreement between the grounds of divorce recognized in the national and in the domiciliary state. This suffers from the great mistake of being too complex. It is very difficult to prove accordance of two systems of laws in their application to particular cases. See also von Bar, i, p. 502, note 38. I opposed the provisions of Art. 2 at the Second Conference (Meili, “*Das int. Privatrecht und die Staatenk. im Haag*,” pp. 51–54). It has since, however, been adopted in the following statutes:—

- (a) Art. 17_a, German Introductory Act;
- (b) Art. 167, proposed Civil Code for Switzerland.

2. The solution found by the Third International Conference doubtless represents progress over the former. Agreement of both laws in regard to one ground for divorce is no longer required. It suffices that:—

- (a) a ground exists according to the *lex patriæ*; and
- (b) another according to the *lex domicilii*, or conversely.

Each ground is thus looked upon as half a ground (“*demi-cause*”), and their addition forms together a whole ground inter-

nationally. We can here speak of a certain reconciliation between the *lex patriæ* and the *lex domicilii* in the manner proposed by me at the Conference of 1900; it is from this point of view only that we can approve of Art. 2 (*Actes*, 1900, p. 193). In the committee of the Third Conference, I supported the conclusion of the Institute of International Law, which I consider in every way sounder (see also Renault's Report, *Actes*, 1900, p. 208). The solution with the two half grounds is, to my mind, very artificial and complicated, and the more I reflect upon it, the less satisfactory I find it. Furthermore, the idea does not find clear expression in Art. 2.

§ 81. Parental Authority.

v. Bar, i, p. 534.

Pillet, "*De la déchéance de la puissance paternelle*, etc.," in *Journal de dr. i.*, xix, p. 5.

Taudière, *Traité de la puissance paternelle* (1898), p. 21.

I. *Parental authority is governed by the personal statute of the father (after his death, the mother). As a matter of legislation, however, sometimes the *lex patriæ*, sometimes the *lex domicilii*, is given the preference.*

1. Parental authority is recognized over children of the following categories:—

- (a) born in wedlock;
- (b) legitimated or adopted;
- (c) placed upon equality with those born in wedlock, either by voluntary recognition (wherever this system exists in the private law of the particular state) or by judicial decree.

Questions thus arise, as to whom parental authority is to be assigned, upon what circumstances does it cease, and what rights and duties result from it.

2. Parental authority is an incident of family relationship, and therefore the *lex patriæ* would seem to be alone the proper standard. The *lex patriæ* has been adopted:—

- (a) By German law. Art. 19, Introd. Act, provides:—

"The legal relations existing between the parents and a child born in wedlock are determined by German law, if the father, or, if he be dead, the mother, possess the citizenship of the Empire. The same is applicable where the citizenship of the father or mother has been lost and that of the child has continued."

- (b) By Italian law (Art. 6, *Disposizioni*).

The authorities differ as to the law of Austria. Jettel ("*Handb. des int. Privat- und Strafrechts*," p. 55) says that the relations between parents and children are determined by the personal statute of the legitimate father, which, in Austro-Hungary, is the *lex patriæ*. But Jettel adds that the laws of the place of sojourn may be invoked to prevent the exercise of a *too* extensive right of corporal correction, or of any other excessive right accorded by the personal statute.

Unger (*System des österr. allg. Pr. R.*, i, § 23, p. 195) distinguishes as follows:—

- (a) to determine the existence of parental authority, as based upon procreation in marriage, the *domicile* of the father at the birth of the child is authoritative;
- (b) to determine the scope of the authority, the law of the *momentary* domicile of the father controls.

3. The law of Switzerland provides in Art. 9, *N. & A.*:—

"Parental authority is governed by the law of the domicile."

There is no doubt that a certain sphere of influence should be granted the domiciliary law, especially in regard to rights connected with the training of children, their duty of obedience, and their correction. This would be necessary, for example, with regard to Arts. 376–377, French *Code civil*, which gives the parent a right to incarcerate the child. The proper view seems to me to be as follows:—

- (a) The national law of the father may grant more extensive rights than the domiciliary; in this case it is to be regarded as tempered by the latter.
- (b) The domiciliary law may go farther; in this case the right of the father is not made greater, as the authoritative law of the family is satisfied with a minus.

In practice, the result reached is the same, but only by means of that mystic formula, public order. It would be sounder to relinquish this "*deus ex machina*," and to recognize simply that the national law cannot provide the extent to which parental authority may be exercised.

If an alien who has been judicially deprived of parental authority in a foreign state settles in the internal state, he cannot suddenly be reinvested with it by virtue of his change of domicile, even though the domiciliary principle be supported there. The

controlling reason is simply that, parental authority being lost, there can no longer be any reference to domiciliary law to determine its scope. In this connection confer also Art. 4, *N. & A.*

II. *The personal statute also determines the scope of the right in respect to the property of the children (e.g. usufruct and administration).*

The law of England and America is here again affected by the distinction between movables and immovables. The rights of the father in regard to movables are governed by the *lex domicilii*, while in regard to immovables, the *lex situs* determines. Story is of the opinion that all difficulties are overcome by this simple and uniform rule (Story, § 463; with which compare Wharton, § 255).

The question arises whether a change of nationality by the father will make his rights determinable by the new national law even in regard to property of the children already acquired. An affirmative answer was given by § 23 of the draft of the German code:—

“The personal relations between parents and children, as well as the rights of the parents in property of the children, are determined by the law of the state to which the parent momentarily belongs. Upon a change of nationality, the rights also change, even in regard to property.”

This provision, however, was not adopted by the Introductory Act. It is based upon the idea that the position of the father in his economic relations to the child is a continuing one, determined by law (not by contract), viz. by the law which governs the general legal relations of the father in this matter. It is not dependent upon the time of birth, and, therefore, no reference should be made to the time when the property was acquired. Injustice may, however, arise from such a view (see Wharton, § 256). At the worst, it might occur that a general right of stewardship over the whole estate be granted by the old *and* the new personal statute, *i.e.* such a long-continued administration over the whole estate that it would be impossible to divide it into portions in accordance with the time the change was made.

In America and England

As to the Person of the Child.—The parental authority of a foreign father (or mother) is recognized in these jurisdictions, but

only to the extent that it is permitted to be exercised by the law of the domicile (*Johnstone v. Beattie*, 10 Cl. & F. 42; *Nugent v. Vetzera*, L. R. 2 Eq. 704; *People ex rel. Campbell v. Dewey*, 50 N.Y. Supp. 1013). In the latter case, the court refused to recognize the decree of a foreign state regulating the relations between parent and child where the parties were only transiently sojourning there, quoting *Hunt v. Hunt*, 72 N.Y. 217, 227, in which it was said "that every state has the right to determine the status, or domestic, or social conditions of persons domiciled within its territory." The rule has been applied so as to absolve a parent of the duty of support, where the law of the (foreign) domicile so provides (*Macdonald v. Macdonald*, 8 Bell & M., 2d ser. 331). Rights of correction are usually regarded as within police control, and hence a strictly territorial rule is applied (see *Blackinton v. Blackinton*, 141 Mass. 432, 5).

As to the Property of the Child.—It would follow from the rule that movables follow the person, that the domiciliary law also governs the right of the parent with respect to the movable property and earnings of the child. The authorities are sparse, though the *dicta* of an old English case point this way. In *Gambier v. Gambier*, 7 Sim. 262, the father claimed a life-rent in his children's property; it was stated by Sir L. Shadwell that "so long as they [the children] were domiciled in this country, their personal property must be administered according to the law of this country." See also Wharton, § 256.

§ 82. Guardianship.

Gabba, Report of the 13th Conference of the International Law Association, 1887, pp. 130-146.

Loiseau, *Traité de la tutelle en droit international* (Paris, 1887).

I. *The right of placing under guardianship aliens in the inland or natives abroad, with all the results connected with this proceeding, is dependent upon their personal statute.*

1. In regulating the law of guardianship internationally, a certain peculiarity of the subject-matter comes into view. The question here is not merely to determine what objective system of law is applicable to the individual case; it is a question broader than that, viz., the creation of an organic medium functioning during a certain period. It is therefore particularly difficult to separate

substantive law and the forum. It is also necessary to note that the question before us now is one of family law, while that as to the capacity or incapacity of a person to act, by reason of actual tutelage or for some other good cause, belongs to the law of persons (*q.v.*).

2. If we approach the subject of guardianship, first theoretically and without reference to any positive law, the following problems will present themselves :—

- (a) upon what grounds may a guardianship be initiated, continued, or dissolved,
- (b) what is the proceeding,
- (c) who may be guardian,
- (d) what officials control the guardian,
- (e) in what way do the official and the guardian co-operate,
- (f) what shall be the security for the ward.

3. Within the conception of guardianship falls :—

- (a) ordinary tutelage ; here belong, in addition to the guardianship of minors, also that of persons with a bodily infirmity, of prodigals, and of those voluntarily placing themselves under guardianship ;
- (b) extraordinary tutelage ; here belong the *tutela ventris, absentis*, and temporary public tutelage of the wife during bankruptcy of the husband, or to enable her to perform certain legal transactions.

The *tutela absentis* is peculiar in that the absent person does not become incapacitated to act by virtue of the appointment of a guardian. The creation of a public stewardship and representation is for the protection of the property and exists only with the reservation that the absent person does not otherwise dispose regarding it.

4. The kinds of guardianship here discussed do not include :—

- (a) The matrimonial guardianship of the husband over the wife ; this is part of the law of persons.
- (b) The *tutelle officieuse*, which may be denoted as the first step toward adoption (French *Code civ.*, Art. 361).
- (c) The special guardianship of a child whose legitimacy is denied by the presumptive father. A protest of a presumptive father as to the legitimacy of the child is determined by the law (and forum) to which the father is subject. It may be made as against the mother and also as against the child. In Switzer-

land the matter would be clear, as the position of persons within the family is altogether subject to the *lex* (and *forum*) *patriæ*, Art. 8, *N. & A.*

- (d) Representation for vacant inheritances. Here the personal statute of the deceased is applicable, though a provisional curatory may be created by each country in which there is a part of the estate (v. Bar, ii, p. 353).

5. The usual official guardianship is an institution that must be distinguished from the so-called natural guardianship of parents over minor children. Compare:—

- (a) Art. 220, *Codice civile* of Italy,
(b) § 1684, German Civil Code.

6. The powers of the guardian are determined by the law of that state under whose jurisdiction the guardianship was created. This applies, for instance, to the following questions:—

- (a) as to what transactions require official ratification,
(b) as to how far contracts of lease of real estate will hold good beyond the term of the guardianship. The other party has sufficient opportunity to inform himself as to the provisions of this system of law, and the *lex rei sitæ* does not apply (v. Bar, i, 572).

The same principle applies to the legal responsibility of the guardian.

II. *The tutelage of insane persons is properly a topic to be considered for itself.*

In determining the rules of conflict relating to guardianship, it is of particular importance to separate the various kinds of guardianship one from another. It is improper to treat all the questions arising here under one head, irrespective of whether they concern the guardianship of minors or the interdiction (tutelage) of major persons. In regard to insane persons it must be noticed that the territorial law may play quite a rôle, as we are there frequently involved with public police regulations.

In view of this fact, the disabilities arising from such a guardianship or curatory are most naturally governed by the territorial law. The fact that a curatory for insanity has been initiated or decreed in a foreign country does not, of itself, compel recognition of the curatory in another state in the absence of treaty. As a practical matter, the state in which the property lies has the advan-

tage, and usually will not surrender the property merely because the other state has created a curatory.

III. *The condition of the law in the various countries is as follows:—*

1. *German law sets up two propositions:—*

- (a) A German citizen cannot be placed under curatory abroad; at least such curatory will not be recognized in Germany. The Code of Civil Procedure has enacted a domestic forum for the curatory of Germans domiciled abroad (§ 648);
- (b) The German state retains the right to place under curatory aliens domiciled or sojourning in the Empire (Art. 8, Introd. Act). Cf. also §§ 36, 37, and 47, Imp. Stat. upon Matters of Voluntary Jurisdiction. In § 47 it is provided that the inland court having jurisdiction may surrender it in favor of the foreign court of the party's domicile or sojourn, if it be for the interest of the ward.

Furthermore, a guardianship or curatory may be decreed against an alien, according to German law, if the foreign state does not undertake it, even though entitled to do so by its laws (Art. 23, Introd. Act).

2. *Austria.* Art. 183 of the Imperial Patent of August 9, 1854, provides:—

“If an alien leave a minor child in Austria, the court may appoint a guardian for it until the competent foreign official has made other provision for the same.”

Friedländer (*“Das Verfahren ausser Streitsachen nach k. Patente vom 9 Aug., 1854,”* 12th ed., p. 179) remarks that the guardian will be appointed notwithstanding that “the personal rights” affecting the personal quality and relationships of the ward are determined by the law of that state to which, as a citizen, he is subject. It is also stated that the above law also applies to “*major* persons within the territory” without considering the proceeding adopted by the foreign state with regard to Austrian subjects.

Confer also the Austrian Statute of 1895 upon the Exercise of Jurisdiction, § 109.

3. *Italian law* has here also adopted the principle of *lex patriæ*. The guardianship of aliens in Italy and of Italians in foreign lands is governed by national law (Art. 6, *Disposizioni*). A guardian for a minor Italian girl appointed in Switzerland pur-

suant to the law of her domicile requested the delivery to him of a legacy left to her in the home country. The Italian government replied to the Federal Council as follows (*B.*, 1891, ii, p. 539, No. 17):—

“The guardian appointed in the Swiss canton cannot be recognized in Italy, as the appointment of a guardian for one of our subjects abroad must, according to Italian law, take place under the provisions of the Italian Civil Code, whereby the competent officials must call a family council composed of the nearest relatives, to whom shall be given the right to appoint a guardian.”

4. The law of *England and America* makes the law of the ward's domicile govern the appointment of the guardian and the management of the estate. The guardian has therefore the right to administer property situated in a foreign country. Wharton says at § 260 that “. . . a guardian duly constituted according to the laws of the domicile of the ward should be recognized as such by all other countries.”

The English and the American courts do not, as a rule, appoint guardians for their own subjects who are domiciled abroad, at least not unless the person in question possesses property within the territory.

See also Supplement to § 62, *supra*.

5. The *Argentine* Civil Code provides as follows with reference to guardianship:—

“Art. 409. The administration of a guardianship created by the courts of the Republic is exclusively governed by the present code, if the property of the ward is situated within Argentine territory.

“Art. 410. If the ward possesses property, whether movable or immovable, without the territory of the state, its administration and disposition are governed by the law of the country where it is situated.”

§ 83. A Peculiar System of solving Guardianship Conflicts.

The Swiss law is based upon a reconciliation of the two opposing principles in International Private Law. This precedent is, in my opinion, highly commendable.

1. The Federal Statute, *N. & A.*, contains the following very interesting rules:—

“Art. 10. Excepting the provisions of Arts. 12–15, guardianship is governed exclusively by the law of the domicile of the person

to be placed under guardianship, or who is already under guardianship.

"Art. 11. The law of guardianship within the meaning of this act embraces the rules with reference to the care of the person as well as the administration of the estate.

"Art. 12. The guardianship officials of the place of domicile must give those of the home canton notice of the commencement and vacating of the guardianship, as well as of a change of residence of the ward, and, upon request, give them any other information relating to the guardianship.

"Art. 13. Whenever a disposition is to be made with reference to the religious training of a minor ward, according to the provisions of Art. 49, par. 3, of the Constitution, the officials of the domicile must obey the instructions of those of the home canton in this regard.

"Art. 14. The competent officials of the home canton may move the appointment of a guardian for citizens of their canton domiciled without the same, with the competent officials of the canton of domicile. Such a motion must be granted if the guardianship appears well founded according to the law of the domicile.

"Art. 15. If the officials of the domicile have neglected the personal or property interests of the ward or the interests of the home commune or are not in position to properly guard the same, or if the officials of the domicile have not obeyed the instructions of the home officials with reference to the religious training of the child, the home officials may demand that the guardianship be surrendered to them.

"Art. 16. Disputes arising by reason of the motions and requests of the home officials under Arts. 14 and 15 shall, upon the suit of these officials be determined, in the last instance, by the Federal Court sitting as a public tribunal. In imperative cases, the President of the Federal Court may act to protect imperilled interests.

"Art. 17. If the guardianship officials permit of a change of domicile by the ward, the right and the duty of administering the guardianship pass to the officials of the new domicile and the estate of the ward is to be surrendered to him.

"Art. 18. The administering of a guardianship at the domicile and in the home canton at the same time is forbidden.

"Art. 33. A guardianship conducted for an alien in Switzerland shall be surrendered upon the request of the competent foreign home officials, provided the foreign state holds its own jurisdiction to be paramount."

These provisions represent a most interesting attempt to reconcile the two main theories. Upon principle, the domiciliary law

governs (Art. 10), but the statute gives certain rights of jurisdiction to the national state. The surrender provided for in Art. 33 also represents a tempering of the domiciliary by the national law; it is a peculiar precedent, especially as the control of guardianships constitutes a branch of public administration.

2. As in regard to other subjects, the provisions above quoted are applicable by analogy to aliens domiciled in Switzerland (Art. 32), excepting, of course, such provisions as cannot, from their nature, be applied internationally. Thus Arts. 13 and 15 cannot apply, as Swiss officials could not be subjected to foreign control in the manner provided between cantons. Neither can Art. 18 be thus applied, as the officials of a foreign state could not be prevented from creating a guardianship on their own account.

3. In Switzerland, too, natural (paternal or maternal) guardianship is regarded as a matter of personal law and therefore subject to the rules regarding the status (Art. 34, *N. & A.*). It is therefore a matter reserved to the *lex patriæ* (see § 58, *supra*).

4. The position of Swiss subjects domiciled abroad is here also regulated by Art. 28, Nos. 1 and 2, *N. & A.*, which makes the Swiss law applicable unless the foreign law otherwise provides. Land located in Switzerland is, however, subject to administration by the Swiss guardian under the *lex* and *forum originis* (*patriæ*). If a Swiss subject be under guardianship at the time of leaving Switzerland, the officials of the domicile will still continue to administer the estate as before (Art. 29).

5. The relations of Switzerland with France and Italy in regard to the creation and administration of guardianships have been regulated by treaty.

§ 84. The Labors of the Institute with Reference to the Guardianship of Alien Minors and Adults.

The Institute of International Law has repeatedly been engaged upon the questions discussed in the preceding paragraphs.

It has adopted a series of principles relating to the guardianship of alien minors to serve as a model for future legislation. It has also adopted rules of procedure to carry these principles into execution (*Tableau général de l'Institut*, 1873-1892, pp. 44-49). It has also adopted principles relating to the guardianship (inter-

diction) of adults (*Annuaire*, 1895-1896, xiv, p. 163, with the discussions at pp. 146-163). Compare also:—

Lehr, in *Revue de dr. i.*, xxiii, pp. 515-517.

Annuaire, 1889-1892, xi, p. 104, and discussions, pp. 87-104.

§ 85. The Treaty of the Hague Conferences relating to Guardianship.

The Third International Conference formulated a treaty in regard to the guardianship of minors. It has been adopted by seven of the nations represented at the Conference (see § 5, II, *supra*), and will probably be ratified by other nations. The text of the treaty and an English translation will be found at Appendix III, *infra*.

The treaty would seem open to criticism from two points of view:—

1. the idea of a reconciliation between the two main principles does not find sufficient expression ;
2. provisions with regard to the forum and for the determination of disputes are indispensable and should not have been omitted in connection with this subject-matter. As a matter of fact, in dealing with guardianship, we are dealing with an organic institution and the grounds for instituting a guardianship cannot be separated from the organization of the governmental bodies which shall control it.

I called the attention of the Conference to this (*Actes*, 1900, p. 89), but the committee decided that the question did not come within its province (*Actes*, 1900, p. 105).

At the Conference of 1900, a special committee also reported a project for the regulation of interdictions (*Actes*, 1900, p. 202), but it has not been passed upon by the delegates.

§ 86. The Duty of Aliment as between Members of the Family.

Laurent, v, Nos. 84-95.

L. Olivi, "*Du conflit des lois en matière d'obligation alimentaire*," in *Revue de dr. i.*, xvii, pp. 55-64.

I. According to the conception prevailing on the Continent of Europe, the *lex patriæ* governs. The ethical bond of the family is involved and therefore the duty of support is dependent upon the national law of the obligor.

1. A duty of support may arise between the following classes of persons :—

- (a) Between spouses ; this obligation is part of the marriage relation. Arts. 212 *et seq.* of the French Civil Code are under the title "the respective rights and duties of the spouses" and under the over-title "concerning marriage." The Italian Civil Code speaks of the duty of aliment in Art. 130 under the over-title "concerning the rights and duties arising out of wedlock." The duty of support presupposes a normal communal life and does not exist between persons cohabiting out of wedlock.
- (b) Between ancestors and descendants ; this obligation is based upon natural relationship and is likewise based upon family law. The duty of supporting children exists irrespective of whether they were originally born in wedlock or afterward legitimated. This is true even in countries where legitimation by judicial act is unknown (England, America). Children who cannot be legitimated according to the authoritative personal statute, of course do not possess such right of aliment.

2. In addition to the cases mentioned, a right of aliment may exist, by reason of an ordinary private contract. Here the ordinary rules of the international law of obligations are controlling.

3. Fiore is of the opinion that the territorial law should govern, as the question of aliment is one of public order and touches the discipline and morality of the family ("*Droit int. privé*"; Pradier-Fodéré's translation, No. 109, pp. 203-205). To this effect was the decision of the Civil Tribunal of the Seine, and the Court of Appeal in France (1869). By this decision, American parents-in-law were compelled to aliment their French son-in-law and their grandchild (Arts. 207, *Code civ.*). But the judgment was not recognized in the United States, whither the parents-in-law removed later (*Journal*, i, p. 45). The view of Fiore is, in fact, untenable.

4. The correct view is followed by Art. 9, Swiss Fed. Stat., *N. & A.*, which provides :—

"The duty of support between relatives is governed by the law of origin of the person owing the duty."

The *courts* of the domicile, however, are competent even with reference to aliens domiciled in Switzerland.

- (a) Although Art. 9 speaks only of "relatives," the wife is also intended, provided she lives with her husband. It is a duty based upon law, and, therefore, cannot be varied by contract, although

the provisions of a contract may serve as a rational method of arriving at the needs of the person entitled to support, and at the means of the person owing it (*H. E.*, xx, p. 24).

- (b) The *lex patrie* applies also to the right of aliment growing out of injuries received in factories, as, for instance, under the Swiss Fed. Stat. of 1881, upon the liability of factories. By Art. 6, it must be shown that the person killed or injured was under a duty of support according to the national law. The question here again arises whether the husband was under such duty where the wife lived separate. The Federal Court applied the former State Law of Baden (§ 214) in a certain case, that being the national law of the person injured; accordingly it was held that the right of aliment ceased where the wife no longer performed her marital duties and had abandoned the husband (*A. E.*, xxii, p. 188).

In America and England

According to Story (§ 198), the matrimonial domicile, or, if that cannot be ascertained, the domicile of the husband, will determine the relation of the spouses with regard to aliment. But this law often coincides in practice with the forum, as wives claiming aliment, or demanding protection, will resort to the forum of the place of residence. These courts will not, however, determine any questions of rights so as permanently to affect the marriage relations, unless they also have jurisdiction by domicile. In England these personal relations are supposed to depend solely upon the forum (Westlake, p. 61). American authority also tends to draw away from Story's reasoning (*De Boimont v. Penniman*, 10 Blatch. 436).

The same view is taken as to the claims of children for aliment. Thus, in Scotland it has been held that personal presence in the territory, for however short a time, will found jurisdiction to entertain an action for aliment by a child against a father, the father having the child with him within the jurisdiction of the court (*Ringer v. Churchill*, 1840, Ct. of Sess. Reps., 2d Ser., p. 316). The state of the law has been left somewhat in doubt by the more recent case of *Macdonald* (cited *supra*, § 83), wherein a narrow majority of the court held to the domiciliary standard.

Rules relating to the aliment of illegitimate children are considered, in the United States, as penal ordinances, and hence subject to the law and jurisdiction of the place where the "offence"

was committed (Wharton's "Criminal Law," 8th ed., p. 1741). Where it is resorted to as police relief, the place where it is required assumes jurisdiction (*Kolbe v. People*, 85 Ill. 336).

§ 87. Adoption.

v. Bar, i, p. 547.

Weiss, iv, p. 101.

I. Adoption should properly be governed both by the personal statute of the person adopting and of the person being adopted, though legislation frequently makes the former alone authoritative.

1. The questions arising here embrace:—

- (a) the requisites for adoption ;
- (b) the necessity of obtaining the consent of the person to be adopted, or that of his parents or guardian ;
- (c) the necessity of obtaining the consent of the spouses and of the officials of the commune or state of origin of the persons adopting ;
- (d) the requirement of a preliminary period of care and maintenance ;
- (e) the legal effect of adoption. Especially important here is its effect in matters of succession as a result of the entry by the child into the family of the adoptive parent. The question also arises as to the right of the child to the name of the adoptive parent and as to whether nobility can be transmitted in this way.

In this connection it is to be noted that the effects of adoption may be validly controlled by contract (*e.g.* see § 1767, German Civil Code).

Adoption affects the legal relations of the family. This was especially true of the Roman conception of adoption (*arrogatio*); the admission into a family, or *gens*, was essential. The same idea prevails to-day, though it is, perhaps, not carried out in the same degree. See §§ 182–184, Austrian Civil Code; § 1767, German Civil Code. The Swiss conception is similar, as is shown also by the fact that the Federal Statute upon Marriage forbids marriage between adoptive parents and adoptive children (Art. 29, No. 2, *b*).

2. As to the law to be applied, that of the adoptive parent is often alone referred to, although upon principle, the law of both parties should be observed (v. Bar, i, p. 547). The question has

been repeatedly asked as to whether the observance of the personal statute, either of the adoptive parent or that of the adoptive child, does not suffice.

It is, indeed, a matter of doubt which objective system of law should have the preference, where the legislature wishes, *in the interest of adoption*, to dispense with the observance of *both* personal statutes. What law shall be given the preponderating influence? Catellani (No. 590) favors the law of the child, while Rolin ("*Principes du dr. i. privé*," ii, No. 604) is certain that the right to adopt is dependent upon the law of the adoptive parent and considers adoption permissible, even if the home state of the person to be adopted does not recognize the institution.

3. *Italian* law subjects adoption to the *lex patriæ* by Art. 6, *Disposizioni*, under the head of "relations of the family." The rule applies both to Italians abroad and to aliens in Italy. Accordingly, in both cases, the adoption must accord, formally and substantively, to the national law of both the person adopted and adopting. Catellani says, however, that "the jurisprudence of France and that of Italy are inclined to favor the law of the parents."

4. The German Introductory Act, Art. 22, provides:—

"Adoption is governed by German law if the person adopting is possessed of German citizenship at the time of adoption.

"If the person adopting is a foreign citizen, while the child possesses the citizenship of the Empire, the adoption shall be invalid if the consent of the child, or that of a third person standing in a family relationship to the child, has not been obtained pursuant to German law."

5. According to *Austrian* law, the personal statute of the person adopting governs upon principle. I refer to Jettel ("*Handbuch*," etc., pp. 55-56) and to § 113 of the Austrian Statute upon the Exercise of Jurisdiction. Unger ("*System*," i, p. 195) also takes this view in that he says:—

"Adoption is governed by the domiciliary law of the adoptive parent. Thus, if an Austrian domiciled in Austria adopt a child in France, the provisions of Austrian law must be observed; if an Austrian domiciled in France adopt a child there, the provisions of the French law are then applicable."

6. According to Swiss law, the national law of the adoptive parent is exclusively applicable (Art. 8, *N. & A.*).

- (a) An Italian domiciled in Switzerland can adopt a child there only by observing the law of Italy, and, therefore, must obtain the authorization of the competent court of appeal (Arts. 202-219, *Codice civile*).
- (b) An Englishman domiciled in Switzerland cannot adopt a child there, either of Swiss or other nationality, as the law of England does not recognize the institution of adoption.

II. *It is to be noted that so far as the form of adoption is concerned, many systems of law require the co-operation of the courts or administrative authorities. In this event, however, the maxim of "locus regit actum" cannot be relied upon.*

1. The consent of the judicial or administrative bodies is not a bare formality. Compare Catellani, No. 573; Duguit, "*Les Conflits de législations rel. à la forme des actes civils*," 1882, p. 99. It constitutes a "*condition*" or form "*intrinsèque*." Compare Laurent, vi, No. 34; Gierke, "*D. Privatrecht*," i, p. 231, note 60. A very complete and sound explanation of the significance of form in relation to adoption is also to be found in Buzzati, "*L'autorità delle leggi straniere relative alla forma degli atti civili*," 1894, p. 342.

It cannot be said that the proceeding in adoption is of a formal nature, and that, therefore, the maxim of "*locus regit actum*" controls. Adoption cannot be regarded as an ordinary civil contract. Governmental ratification of the act is a substantive requisite to its validity, and not a mere form. The state to which the adoptive father belongs is interested in the welfare of his family, and, therefore, retains to itself the right to ratify or to veto the act of adoption; there is no right of the parties to a ratification. Thus ratification may be correctly designated as an act of executive authority.

2. In France and Italy the courts must co-operate (Art. 216, *Codice civile*). For this reason, it was properly held in France that an adoption undertaken by a Frenchman in Belgium of a Belgian subject was null and void, although performed in the presence of a justice of the peace in Brussels, and was consented to by the court of first instance and the Court of Appeal at Brussels (*Journal de dr. i.*, xi, p. 179).

3. In Germany the District Courts have jurisdiction (§ 66, Imp. Stat. of 1898, upon Matters of Voluntary Jurisdiction).

4. In Switzerland, judicial ratification is required in some cantons (Geneva, *A. E.*, xii, p. 11), in others, that of the Orphans' Bureau and the Department of Justice (Zurich, Code, §§ 720 *et seq.*). In the latter canton, an adoption of one of its citizens domiciled in Italy, of an Italian subject, was refused recognition because no ratification of the officials of Zurich had been obtained (*H. E.*, xx, p. 215).

5. In some states (*e.g.* Bolivia, Uruguay) a mere notarial act is sufficient. The citizens of these states can undertake an adoption abroad by observing this formality.

III. *An adoption completed in legal manner in one country should be recognized everywhere, even in those countries the laws of which do not recognize the institution.*

A citizen of Zurich who, in 1869, became naturalized in Chile without surrendering his nationality in Switzerland, adopted an illegitimate child in Zurich in 1878. An action for aliment by the adopted child was dismissed in Chile because the law there does not recognize the institution; it also holds that the Chilean laws are applicable to all inhabitants of the territory, including aliens. As the adopted child distrained the property of the adoptive father to secure her action for aliment in Zurich, the question arose whether this proceeding was not barred by the case already adjudicated. The courts of Zurich declared that the defendant's answer was subject to the reply that the judgment in Chile was void, in that the nonsuit of the plaintiff upon the ground stated involved a denial of justice; also that the adoption which took place outside of Chile created a valid legal relationship, and that a vested right of private law should have been recognized by the judge even of a state wherein the act could not have been undertaken (*H. E.*, x, p. 157). This is, in fact, an entirely correct proposition in International Private Law.

IV. *A contract for succession made between spouses, under certain circumstances, loses its effect by virtue of an adoption.*

A case of this kind is presented, for instance, where the spouses agree that the survivor shall inherit "if God does not bless us with children," and they thereafter adopt a child. The condition refers to the existence of children entitled to inherit, and not merely to issue.

With regard to the active rights of succession of adopted children, the law which governs is that applicable generally to the estate of the deceased, whether of the adoptive parents or of the natural relatives of the child.

An adoption which had been completed in Saxony was held in New York not to grant a right of succession where the will spoke of "legal issue," as only issue of the body was thereby designated (*D. Jurist. Ztg.*, 1900, p. 508). Compare also *Zeitschrift für internat. Privat- und Strafrecht*, iii, p. 348.

In America and England

England does not recognize the institution of adoption. It is said that it creates a status unknown to English law, and therefore that a child adopted according to the laws of a foreign country will not be granted rights of succession in England (Dicey, p. 475). It is submitted, however, that this view is inconsistent with the doctrine of English courts with regard to legitimation by subsequent marriage. Here also we have a status not recognized by English law, and yet, if the father be domiciled in the foreign state where the legitimation takes place, it will be recognized as valid in England (*Munro v. Munro*, 7 Cl. & F. 842). Perhaps the question may still be regarded as an open one in England.

In the United States, at least one of the parties, the adoptive father or the child, must be a domiciled subject of the State creating the status. If so, the adoption will be held valid in all other States to whose jurisprudence adoption is not repugnant, even as to real estate situated therein (*Van Matre v. Sankey*, 148 Ill. 356; *Ross v. Ross*, 129 Mass. 243; *Hartwell v. Tefft*, 35 Atl. (R.I.) 882).

The case cited by the author above, which seems to have occupied the attention of German jurists, is *N.Y. Life Ins. and Trust Co. v. Viele*, 22 App. Div. 80, affirmed in 161 N.Y. 11. It really involved only the interpretation of the will of the adoptive parent. The court concluded that by the term "legal issue," the testator did not intend to designate the adopted child. The court in effect recognized the status created under the jurisdiction of Saxony, and indicated that if the Saxon code had declared that an adopted child should have "the status of a descendant and all the legal

consequences and incidents thereof, the same as though he were born in wedlock," there would have been a basis for concluding that the will intended the adopted child to be included within the term "legal issue."

§ 88. Legitimation of Children born Antenuptially.

Despagnet, "*De la légitimation en droit international privé*," in *Journal de dr. i.*, xv, p. 592.

I. *The legitimation of children born before or out of wedlock is properly referable to the personal status of the party undertaking the legitimation and of that of the child. The rule is, however, frequently avoided, and the act made to depend upon particular requisites instead.*

1. The lawmaker is here usually influenced by practical considerations in that the compulsory observance of both laws would make legitimation more difficult and result in unnecessary detriment to the innocent child. This is especially so in states the internal law of which recognizes the institute of legitimation (Arts. 331-333, French Civil Code).

Art. 10 of the *Règlement* of the Institute of International Law proposes the following:—

"The effects of the marriage . . . upon the status of the children born before the marriage shall be governed by the national law of the husband at the time the marriage was contracted."

2. According to Art. 22 of the *German* Introductory Act, the legitimation of a child born out of wedlock is governed by German law if the father possess German citizenship at the time of legitimation.

3. According to *French* law, legitimation by subsequent marriage can occur only when the parents have recognized the child before the marriage takes place, or, at the latest, in the written contract of marriage itself. It is usually understood that marriages of aliens taking place in France will have the effect of legitimating the children, if the personal law of the parties gives this effect to it. The matter seems still in dispute (*Journal*, xiv, p. 183).

The laws of *France* and *Italy* do not permit the legitimation of children born of adulterous or incestuous intercourse (*adulterini* and *incestuosi*).

4. In *England*, legitimation *per subsequens matrimonium* is not

recognized, although if it has taken place by virtue of a foreign law, most of its legal results will be recognized. See Dicey, "The Law of Domicile as a Branch of the Law of England," etc., i, Art. 35, note:—

"The law of the father's domicile at the time of the birth of a child born out of wedlock determines whether the subsequent marriage of the father and mother legitimates the child" (Trans. from the French of Stocquart, "*Le statut personnel anglais*").

By an English decision (November 1, 1887), cited in the *Journal de dr. i.*, xv, p. 831, it was held that legitimation through subsequent marriage is determined by the law of the country wherein the parent resided at the time of the child's birth. In England this is called the *lex originis*: "The law of the country of origin is not the law of the place where the child was born, but the law of the place where the parents had their domicile at the time of its birth. If the parents had different domiciles, which may occur where they were not married, it is the domicile of the father which governs, and not that of the mother" (Vaucher *v.* Solicitor to Treasury, 40 Ch. D. 216). See also Stocquart, "*De la légitimation des enfants naturels par mariage subséquent en dr. i. privé*," *id.*, p. 205, and Lainé, in *Journal*, xxiii, p. 481.

5. Art. 54 of the *Swiss Constitution* states:—

"A subsequent marriage of the parents legitimates children born antenuptially."

The same statement is found in Art. 25 of the Statute upon Marriage. Legitimation is considered an absolute result of the subsequent marriage of the parents *wholly independent* of the place of origin of the parents. In favoring the institute to so high a degree as to embody it into the Constitution, the sovereignty obviously regarded a distinction between legitimate and illegitimate children of married persons as offending moral and humanitarian principles. It is true that Art. 41 of the Statute upon Marriage provides that the parents shall give notice of the residence of all illegitimate children at the time of or within thirty days of the marriage, but this is a purely administrative provision and does not prevent the registry of the legitimation after that time.

II. *The same principles apply to legitimation by act of the sovereign (per rescriptum principis) where such a system obtains.*

III. *The effects of legitimation must be recognized everywhere, particularly in connection with rights of succession.*

The English practice does not go to this extent; it requires that for succession to immovables the child be legitimated according to the *lex rei sitæ* (compare v. Bar, i, p. 542).

In America and England

The general current of authority in the United States differs from the rule in England only in this, that in the former jurisdiction the law of the father's domicile at the time of the marriage is exclusively authoritative, while in the latter jurisdiction the law of the father's domicile at the time of the child's birth must coincide. Thus, in America, if the law of the domicile at the time of marriage recognizes legitimation *per subsequens matrimonium*, it will be taken to confer a status upon a child born antenuptially which will accompany him everywhere, even for the purpose of inheriting real estate in a jurisdiction where such legitimation is not recognized (Miller v. Miller, 91 N.Y. 315; *In re Hall*, 1901, 61 App. Div. 266 (N.Y.); Ross v. Ross, 129 Mass. 243; Smith v. Smith, 23 Miss. 167, 170. *Contra*, Lingen v. Lingen, 45 Ala. 411.). In the case of *In re Hall*, *supra*, the court recognized the legitimacy of an infant by the marriage of its parents in Dakota, after a divorce obtained there of one of the parties, although it refused to acknowledge the validity of the divorce. It was held that the public policy which led the court to question the validity of the divorce and remarriage, extra-territorially, would not lead the court to deny the status of legitimacy to the issue of such marriage, valid in the State of Dakota.

In England, however, if the law of the country where the father is domiciled at the time of the birth of the child does not allow of legitimation by subsequent marriage, no subsequent marriage will avail to make the child legitimate (*In re Wright's Trusts*, 25 L. J. Ch. 621). So also if the law of the country where the father is domiciled at the time of the subsequent marriage does not allow of such legitimation, the child will not be considered legitimate (*Vaucher v. Solicitor to Treasury*, *In re Grove*, 40 Ch. D. (C. A.) 216).

The domicile of the mother is considered immaterial. Thus, where the domicile of the father was in Scotland, where such

legitimation is recognized, and that of the mother was in England, where it is not, the marriage was held to have legitimated the child (*Munro v. Munro*, 7 Cl. & F. 842).

§ 89. Claims in Bastardy.

Neubauer, in *Z. für vergl. R.*, iii, p. 321 ; iv, p. 362.

Voigt, in *Zeitschrift für internat. Privat- und Strafrecht*, i, pp. 304, 461.

A. Juvara, *Les enfants naturels en droit international privé* (Paris, 1898).

I. *Where bastardy proceedings are combined with a suit based upon seduction, the father's lex and forum patriæ should be controlling.*

Claims arising out of illicit cohabitation are construed in various ways, and frequently the manner in which they are construed is of importance in determining what system of law shall be applicable.

1. Some jurists base the liability in this class of cases upon tort or *quasi*-tort. This is the construction of Windscheid ("*Pand.*," § 475). According to this theory, a defendant guilty of illicit cohabitation is held liable as the possible father, the possibility being construed into a reality because he has been guilty of a tortious act, and the alimentary obligation does not fall away by proving that during the critical period, the mother submitted herself to other men.

Others deduce a liability from the fact of procreation itself, for the following reasons :—

- (a) a *quasi* family relationship is thus established ; especially is this so where fathership also determines the status ;
- (b) fathership alone is a sufficient social basis for an action for aliment ;
- (c) an action for damages in tort should be accorded, especially in the event of seduction.

2. In determining the system of law applicable to bastardy actions, we must distinguish the nature of the various kinds of claims, as follows :—

- (a) a claim for the recognition of the status of a child in connection with a claim for damages and aliment ;
- (b) a claim for aliment alone ;
- (c) a claim by reason of the commission of a tort.

If the action is to determine a family relationship founded upon a promise of marriage, the personal statute of the father is properly controlling; he is the head of the family even where the claim is made by a doubtful member thereof. To this effect is the decision of the German Imperial Court (xxix, p. 291) and Art. 8, Swiss Statute, *N. & A. (H. E., xii, p. 13)*.

II. *The lex (and forum) domicilii of the father are controlling in ordinary bastardy proceedings and in actions simply for aliment.*

1. The domicile which controls is that which the defendant possessed at the time of the cohabitation. Thus where a Viennese woman brought an action against the father of her illegitimate child, the father being domiciled at Vienna at the time of cohabitation, the courts of Zurich, whither he had removed, applied the Austrian law (*H. E., xii, p. 281*).

2. The German Introductory Act is to the contrary upon the question before us:—

“Art. 20. The legal relations between an illegitimate child and its mother are determined by German law if the mother be German. This is so also where the citizenship of the mother has been lost, while that of the child has continued.

“Art. 21. The obligation of the father for aliment of an illegitimate child, and his liability toward the mother for the expenses of pregnancy, delivery, and support, *shall be judged by the laws of the state to which the mother belongs at the birth of the child.* No more extensive claim shall be recognized, however, than are established by German law.”

3. The law prevailing at the place of cohabitation is immaterial. Seuffert (*Kommentar über die bayerische Gerichtsordnung*, i, p. 245) points out that the place of cohabitation is wholly accidental, *e.g.* “the village in which the parties came together to attend a fair, the woods in which they met.” The conclusions of Seuffert from the foregoing are twofold. Firstly, he disputes the *ratio juris* that this accident should determine the extent of the duty of aliment, the right to bring up the child, the future law of succession, or the *exceptio plurium concubentium*. Secondly, he shows that the view would lead to insoluble difficulties where cohabitation took place at different times and at different places, subject to different laws. Thus Seuffert reaches the proper view that the personal law of the defendant is controlling.

III. *Where the case is one of tort (e.g. seduction, rape, infection), the lex delicti commissi is authoritative.*

IV. *In countries having the French system of law, a claim in tort is recognizable only if it be founded upon the law of the place where the act complained of occurred.*

1. Under French law (e.g. French Civil Code, Art. 340, Italian Civil Code, Art. 189, Netherlands Civil Code, Art. 340) the maxim prevails that "*la recherche de la paternité est interdite.*" In these Jurisdictions, actions in bastardy even between aliens are not permitted, as the law of the forum sets up an absolute veto against the investigation of fathership out of wedlock. Contrary, however, is the case of the judgment of a foreign court based upon a claim in bastardy; such an adjudication is available against an alien even in France.

2. A Frenchman domiciled at a place the laws of which permit of actions in bastardy cannot rely upon the *lex patriæ*, as there is no question of status involved.

V. *The limitation of actions, as former discussion has already shown (§ 56, supra), should be governed by the law to which the claim itself is subject. A special development of the rule is here in point.*

The following systems are controlling:—

1. the *lex patriæ* of the father, in actions affecting the status;
2. the *lex patriæ* of the mother (Art. 21, Ger. Introd. Act) and the *lex domicilii* of the father (by Swiss Law) in ordinary bastardy proceedings;
3. the *lex delicti commissi* in actions based upon seduction, infection, and the like.

It is true that the proposition has been advanced that, in actions of bastardy, the *lex fori* governs the limitation by way of an exception to the rule. This has been advanced with much hesitation in Switzerland (Ullmer Supp. No. 2678). The Prussian State Law, § 1083, T. 2, providing a period of two years from the birth of the child, has been interpreted as an imperative rule (Seuffert, *Archiv*, viii, No. 7). This view does not seem sound.

The provision that an action in bastardy may be brought only within a certain period is to be considered as a limitation of the action and (according to the Continental conception) is not a rule of procedure. It is therefore the substantive system of law to

which the action in bastardy is subject, which determines whether the action may be brought within a certain period (*Zeitschrift für internat. Privat- und Strafrecht*, x, p. 494).

This point is to be emphasized all the more because the provisions are often found in rules of procedure.

VI. *Here again it is necessary to separate substantive law from rules of procedure.*

Questions as to the manner and the weight of proof, such as the inferences to be drawn from the relation of the time of delivery with the time of conception, are governed by the *lex fori*. In the action of a Viennese woman brought against an Austrian domiciled in Zurich, the defendant admitted cohabiting with plaintiff in Vienna. A full-grown child had been born on April 25, 1892, and the conception took place on the 1st, 3d, or 5th of September, 1891, according to the assertion of the defendant. As against the plea of the defendant that the conception did not accord with the time of birth, the plaintiff relied upon the Austrian Code of Private Law, particularly § 163, but without avail. This provides:—

“Whoever has been proved in the manner provided by the court rules to have cohabited with the mother of a child within a period of not less than six nor more than ten months from the time of her delivery, or whoever has admitted this out of court, shall be deemed to have procreated the child.”

The Appellate Court of Zurich dismissed the action because, according to the Zurich Code of Private Law, § 702, the shortest possible duration of a regular pregnancy must be taken as 259–260 days, while here, between the 1st or 5th of September, 1891, and the 25th of April, 1892, only 238 or 233 days had elapsed, there being no proof of premature birth (*H. E.*, xiii, 1894, p. 291).

§ 90. Voluntary Recognition of Illegitimates.

In certain states, an adjudication to the effect that a certain bond of family relationship exists between an illegitimate child and its father can only take place in the event that certain prerequisites exist, as for instance, a betrothal preceding the cohabitation (judicial promise to marry, §§ 686, 709, Zurich Code of Private Law). On the other hand, countries governed by the French system of law generally give validity to a voluntary recognition by the father of an illegitimate child, so as to affect rights existing within the family

and (in a limited way) rights of succession (Arts. 334 *et seq.*, 757 *et seq.*, French Civil Code; Arts. 335 *et seq.*, 909 *et seq.*, Netherlands Civil Code). The child then acquires the name and citizenship of the father, is subject to his paternal authority, and is entitled to aliment and to inheritance (see German Imp. Ct., Civ. Cases, vol. 46, p. 314). Children of adulterous or incestuous intercourse are excluded from the operation of this rule.

I. *The capacity to act is sometimes separately regulated with reference to this proceeding.*

For instance, Art. 337, Civil Code of the Netherlands, provides that the father must be over the age of nineteen. The law also requires the consent of the mother to the recognition under certain circumstances (compare Art. 284, Civil Code of the Dutch Indies).

II. *The substantive requisites for and the effects of the recognition are dependent upon the lex (and forum) patriæ of the father.*

1. If the national law does not recognize the institute under discussion, the act will not be given effect though performed abroad. Swiss law makes certain exceptions to this rule.

2. Art. 8, *N. & A.*, provides that the effect of a voluntary recognition is governed exclusively by the law of origin, and is also subject to the home jurisdiction; also that the place of origin is that of the father.

III. *The formality required for this legal act must be specially considered.*

1. According to French law (Art. 334, Civil Code) it is to be noted that:—

(a) the recognition must be mentioned in the certificate of birth for the purpose of publication, and also entered in the registry of births;

(b) it may also take place later through an *acte authentique*. According to French practice, a recognition executed before the birth is also effective. An oral recognition will not suffice under any circumstances (*B.*, 1901, ii, p. 1015).

2. The law of the Netherlands also permits of a voluntary recognition by means of an instrument executed before the officials of the civil bureau (Arts. 336 and 338, Civil Code).

3. A recognition contained merely in a private will is insufficient where the law of the place of execution requires an *acte authentique*.

4. If the national state does not recognize the institute, the observance of the most solemn formalities (*e.g.* recognition in a public will, or in a public and a private will) will not establish a family relationship with the father.

§ 91. The Labors of the Institute with Reference to Marriage and Divorce.

The Institute of International Law adopted a system of principles regulating the conflict of laws in matters of marriage and divorce. As the principles of law upon these subjects have now been definitely settled for Europe by the Hague treaties, the plan of the Institute will not be given here. It is printed in *Annuaire*, 1888-89, pp. 75-79.

LAW OF THINGS

§ 92. Introductory Remarks.

v. Bar, i, pp. 593-599, 623.

Diena, *I diritti reali considerati nel diritto internazionale privato* (1895).

Donle, "Das Fremdenrecht und die Lehre des int. Sachenrechts," in *Archiv für öffentliches Recht*, viii, pp. 249, 513.

Dolk, *Internationaal privaatrecht*, Part II, "Zakenrecht" (Utrecht, 1882).

I. *The standard of lex rei sitæ advances to the foreground in the law of things, especially in respect of immovables.*

Things become objects of legal transactions in various relationships, *e.g.* :—

1. in contracts, *e.g.* sale, exchange, lease, loan for use, bailment;
2. in the property relations of married persons;
3. in succession;
4. in respect of property rights generally.

There is a uniformity among the laws of all countries in determining *real* or *property* rights in immovables by the *lex rei sitæ*. It is immaterial whether such property belongs to natives or aliens. The acquisition and loss of title to land (*e.g.* by occupation, by alluvion), its possession and division between joint or common owners, etc., are matters which the territorial law must govern. Jurisprudence would cease to be a science were a different regulation tolerated. Were the personal law accepted as a standard in contesting title to land, there might be as many titles as there were litigants.

The standard of the *lex rei sitæ* is of remote historical origin. Bartolus says (No. 27):—

"Quarto quæro, quid in his, quæ non sunt contractus neque delicta neque ultimæ voluntates? Pone quidam habet domum hic et est quæstio, an possit altius elevare? breviter, cum est quæstio de aliquo jure descendente ex re ipsa, debet servari consuetudo vel statutum loci, ubi res est."

Argentæus (Nos. 3 and 9) is to the same effect.

II. *But the lex rei sitæ should govern only property rights.*

It should not be said bluntly that immovables and movables are subject to the law of their location. This proposition, it is true, has been widely spread abroad. Joannes Voet ("*Comment. ad Pand.*," vi, p. 254) says, "*tralaticium fit, immobilia regi lege loci, in quo sita sunt.*" Modern legislation is guilty of the same ambiguity.

1. The French *Code civil* states in Art. 3: "*Les immeubles, même ceux possédés par des étrangers, sont régis par la loi française.*"

2. The same phrase is found in Art. 11 of the Spanish, Art. 10 of the Argentinian, and Art. 13 of the Mexican code.

III. *It is particularly to be noted that the question of capacity to act in dealing with things is not governed by the lex rei sitæ, but is determined by the personal statute.*

1. Von Bar seems to be of a different opinion at i, p. 623, but with this however compare i, pp. 597-599.

2. There are some exceptions.

- (a) The English and American doctrine requires that even the capacity to act be determined by the law of the *situs*, at least in respect of immovables. Compare Westlake, § 156 (p. 189), "All questions concerning property in immovables, including the forms of conveying them, are decided by the *lex situs*." Dicey accords (Rule 138).

With regard to capacity to deal with *movable* property Dicey says (Rule 139) that the *lex domicilii* governs. He accompanies the rule with a question mark, and at p. 530 he says, "On this matter it is impossible to speak with certainty."

Story gives the following (§ 463) as a rule of the common law: "It declares that the law of the *situs* shall exclusively govern in regard to all rights, interests, and titles, in and to immovable property."

Story does not lose the opportunity of sharply emphasizing the significance of this principle. He says, "Of course it cuts down all attempts to introduce all foreign laws, whether they respect persons or things, or give or withhold the capacity to acquire or to dispose of immovable property."

Art. 10 of the Argentine Civil Code (see *infra*, V, 4) accords with the English and American practice.

- (b) In Switzerland the capacity to deal with property is governed by the *lex patriæ*, but only to a modified degree because of Art. 10, Fed. Stat. Pers. Cap. This provision makes no distinction between movables and immovables, but regulates the capacity to act in transactions of commercial intercourse gen-

erally. Under these circumstances the Swiss law in the interest of commerce becomes applicable as local law (not as the *lex rei sitæ*) so far as status is involved (see § 58, III, 3, *supra*).

- (c) As to Germany, Art. 7, Introductory Act (at the end), states expressly that the limitation of the *lex patriæ* does not apply "to transactions by which a foreign piece of land is dealt with"; so that here the *lex patriæ* governs exclusively without any "reference," as per Art. 27 (see § 58, III, 1, *supra*).

IV. *In order to properly apply the rule of lex rei sitæ, it is necessary to separate real rights (in rem) from rights of obligation (in personam).*

1. Only real rights are subject to the *lex rei sitæ*.
2. Contractual rights are governed by the rules of conflict regulating obligations.
 - (a) Contracts creating easements and incumbrances may create both real and contractual rights. But the two categories must be kept separate also here.
 - (b) The same reasoning applies to pawns and pledges.
3. In a contract creating real rights, e.g. in the purchase of land, contractual obligations may also be included (e.g. a covenant against competition or some other restriction). Here, again, the rules relating to obligations become applicable.

V. *Legislation upon the international law of things is sparse.*

The only references which can be given are as follows:—

1. Art. 3, French *Code civil*, already cited.
2. Art. 7, Italian *Codice civile*:—

"Movable property is governed by the law of the nation to which the owner belongs unless a contrary disposition is made by the law of the country wherein it is situated.

"Immovable property is governed by the law of the place where it is situated."
3. Art. 10 of the Saxon Code formerly in force provided:—

"Rights in movable and immovable things, inclusive of rights of possession in the same, are determined by the laws of the place where the things are situated."

We cite this statute, though superseded by the German Civil Code, as it properly indicates the application of the law to rights of a real nature.
4. Arts. 10 and 11 of the Argentine Civil Code:—

"ART. 10

"Immovable things located in the Republic are exclusively governed by the laws of the land in respect of their quality as

such, the rights of the parties, the capacity to acquire them, the methods in which they may be transferred, and the formalities that must accompany the same. Rights in immovable property can be acquired, transferred, or lost only in conformity with the laws of the Republic.

"ART. 11

"Movable things which have a fixed (permanent) locality and which are usually possessed without the intention of transporting them, are governed by the law of the place where they are situated; but such movables which the owner always takes with him or which serve his personal use, whether located at his domicile or not, as well as those which one possesses for sale or transportation, are governed by the law of the domicile of the owner."

5. Arts. 790, 791, and 799 of the Property Code of the Principality of Montenegro make the *lex rei sitæ* applicable generally to real rights in movables and immovables and to the formalities in acquiring and altering such rights.
6. Zurich Code of Private Law, § 2:—

"Rights in land are governed by the law of the country in whose territory the land is situated. In determining rights in movable things, the momentary location of the thing and the natural relationship of the same to the local and provincial laws are also to be taken into account."

The Swiss Federal Statute, *N. & A.*, does not attempt to cover the law of things at all.

7. The draft for the German Civil Code contained provisions regulating the international private law of things (§ 10), but they were not adopted in the Introductory Act.

VI. *There are no treaties bearing upon the law of things.*

The only provision to be cited is contained in the international agreement of 1890 relating to railroad freight traffic. Art. 22 contains a rule of conflict relating to the right of distraint enacted in Art. 21:—

"The effects of the right of distraint are determined by the law of the country where the delivery is made."

If we were to include within this title, the law of *incorporeal things*, embracing the law of patents, trade marks, designs, models, and copyrights, then, of course, we would have to cite:—

1. the convention for the protection of industrial property of 1883;
2. the convention relating to the creation of an international union for the protection of works of literature and art of 1886, with the supplementary agreement of 1896-97.

These treaties, however, merely insure a certain minimum of rights to members of the union. To this extent they create a uniform International Private Law within the union. There are some provisions giving effect to the laws of the individual states, and to this extent we have a contractually fixed international law of conflict. These treaties do not come within the scope of the present work.

§ 93. Immovables.

v. Bar, i, 593.

I. *According to universal rule the lex rei sitæ controls real rights in immovables.*

II. *The reasons assigned for this principle are various, viz. :—*

1. That the sovereignty of the state cannot suffer a foreign system of legislation to be controlling, especially for immovables lying within its territory. This view is feudal by nature and if followed out would exclude the application of all foreign laws.

2. Voluntary subjection. This ground was assigned by Savigny (vol. viii, p. 169). From this it would follow that the will of persons and not that of law was controlling. The will of the parties, then, would be a subject of inquiry in each case.

3. The practical requirements of commerce; for if the acquisition or loss of property were made dependent upon personal law, endless frauds and confusion would arise (v. Bar, i, p. 596).

III. *From the nature of the conditions prevailing, no other principle could here apply.*

The laws relating to immovables are allied with :—

1. the organization of ownership in the internal state. This embraces the definition of ownership, questions of abutting ownership, easements, limitations against building, water and mining rights;

2. public credit, particularly in regard to mortgages.

Of course it was not these public and economic grounds which resulted in the application of the *lex rei sitæ* in early times; but they may be cited as reasons for the retention of the doctrine. As a matter of fact, legislation upon this point is uniform everywhere.

In America and England

Real rights in immovables are governed by the *lex situs*; and whenever such rights are affected by the capacity of a party or by the solemnities of a transaction, the *lex situs* will also be authoritative as to these questions (*Welch v. Adams*, 152 Mass. 74; *Wood v. Clutterbuck*, 10 Q. B. D. 403). The question as to what an immovable is, is also determined by the *lex situs* (*Chapman v. Robertson*, 6 Paige Ch. 627, 30). Leaseholds, though considered within the category of personal estate, are regarded as immovables in international relations (*Despard v. Churchill*, 53 N.Y. 192; *Freke v. Carbery*, L. R. 16 Eq. 461). A holographic will executed in accordance with the laws of France, where the testator was domiciled, was held void as to leasehold property situated in England (*Pepin v. Bruyere*, 1901, 83 L. T. Rep. 100).

The question of jurisdiction is here of main importance. The *forum rei sitæ* is alone competent in respect of rights in immovables, as it alone is capable of insuring the enjoyment of those rights, by ejecting parties wrongfully in possession. It has been held, however, that a court of equity will direct a trustee or other party over whose person it has jurisdiction, to perform an act affecting title to *foreign* immovables, when justice cannot be accomplished in any other way (*Miller v. Dows*, 94 U.S. 444; *McElrath v. R.R.*, 55 Pa. St. 189; *Cranstown v. Johnston*, 3 Ves. Jr. (Eng.) 170).

§ 94. Movables.

v. Bar, i, pp. 642-644.

I. *The lex rei sitæ must also be taken as a first principle governing real rights in movables.*

1. An interesting historical process led to this result. As early as the sixteenth century, the authors of the statutory theory denied the application of the *lex rei sitæ* to movables. It was considered unnatural to subject movable objects belonging to the same person to different laws, according to situation. This was especially so in respect of the property relations of married persons and in matters of succession.

In order to avoid such a result, the following maxim was adopted: "*mobilia ossibus inhærent*" or "*mobilia personam sequuntur*." English jurists employ the phrase "personal property

has no locality." Thus the statutory theory arrived at the proposition that the domicile of a person determines his right in movables; or, in other words, rights in movable things were regarded as *statuta personalia*. On the other hand, the Codex Maximilianeus Bavaricus subjected movables and immovables to the *lex rei sitæ*.

2. It was Savigny who proposed to apply the *lex rei sitæ* to movables upon the theory of a voluntary subjection (viii, p. 178). He admitted, however, certain necessary exceptions, viz. :—

- (a) that certain movable things change their location continually, e.g. baggage, merchant goods for export and import (here the subjection theory could not apply and therefore the local law to which the owner is subject was held to control);
- (b) that certain movable things, e.g. the furniture of a house, a library, art collections, inventory of a landed estate, are attached to a permanent location and therefore the *lex rei sitæ* should control;
- (c) that a number of other movable things represent a middle position, e.g. "merchant goods which the owner stores at a place other than his residence; baggage lying at a foreign point" (here Savigny found it impossible to lay down any general rule).

The adoption of Savigny's theory is readily traceable in the Zurich Code of Private Law, § 2 (cited *supra*, § 92, V, 6).

3. The reasoning of Savigny is abstractly correct and has been widely followed. It is particularly true that there is an array of movables which in their nature are subject to continual change of location; besides Savigny's example, we might cite such modern examples as velocipedes, automobiles, etc. Here the momentary locality is unimportant and that law should control where the objects belong, as determined by the use made of them by the owner. In this connection I again refer to Art. 11 of the Argentine Civil Code (§ 92, V, 4, *supra*).

4. The rule of the Italian *Disposizioni* (see *supra*, § 92, V, 2) seems, at first sight, surprising, but theory and practice arrive, though circuitously (with the formula of territoriality), at a recognition of the *lex rei sitæ* even in regard to movables.

II. *The rule is to be limited to rights of property.*

More particularly, it cannot be applied to rights in regard to the marital estate, rights of succession, etc. The maxim of *lex rei sitæ* is therefore subject to exception wherever we are dealing

with the estate of a person as a whole, unless internal laws (incorrectly) enact the contrary.

III. *It is to be noted that many rights which belong to the law of obligations are looked upon as movables under modern systems and treated as within the law of things (e.g. securities, bills of lading, warehouse receipts).*

In America and England

A rule may be deduced from the authorities in both jurisdictions to the following effect: that the maxim of "*mobilia ossibus inhaerent*," or "*mobilia sequuntur personam*" as it is more often expressed, will be recognized so far as to render it optional in dealing with rights in movables, whether to observe the *lex situs* or the law of the place where the owner is domiciled (*Barnett v. Kinney*, 147 U.S. 476; *Warner v. Jaffray*, 96 N.Y. 248; *In re Queensland*, etc., Co., 1 Ch. 536). Where the two systems of law are in absolute conflict, the *lex domicilii* must give way to the *lex situs* (*Barnett v. Kinney*, cited *supra*; *Frank v. Bobbitt*, 125 Mass. 112; *Cammell v. Sewell*, 29 L. J. Ex. 350; *In re Queensland*, etc., Co., cited *supra*; *Alcock v. Smith*, 1 Ch. (C.A.) 238, 267).

A distinction is also to be made between a transaction which is *voluntary*, in which case its validity and effect is governed by the maxim just quoted (*Cronan v. Fox*, 50 N.J. L. 417; *Barnett v. Kinney*, cited *supra*) and one which occurs by operation of law, in which case the domiciliary law alone controls (*Russell v. Hooker*, 67 Conn. 24; *Cross v. Trust Co.*, 131 N.Y. 330, 339).

NOTE

In the draft of the new Belgian code, the fiction of "*mobilia ossibus inhaerent*" is rejected in the following words:—

"Que les biens meubles, comme les biens immeubles, sont soumis à la loi du lieu de leur situation en ce qui concerne les droits réels dont ils peuvent être l'objet."

This precedent is approved by De Paepe in *Revue de dr. i.*, 2d Series, ii, p. 433.

§ 95. The Maxim "*locus regit actum*" in the Law of Things.

v. Bar, i, pp. 615-618.

I. *The form for the acquisition and loss of rights in things is governed by the situation of the thing dealt with.*

1. We have pointed out (§ 55, *supra*) that the rule of "*locus regit actum*" does not apply in all cases.

2. A transaction dealing with a thing may affect the interests of an indefinite number of third persons as a real right presupposes a right as against the world. It is for this reason that the acquisition and loss of real rights are often associated with certain forms closely identified with the rights themselves.

We must distinguish in theory between the forms which are the basis for the establishment of:—

- (a) contractual rights; and
- (b) those which are necessary for the creation of property rights.

3. The principal examples of forms necessary for the acquisition of rights in land under modern systems are registry and publication. These formalities are demanded in the purchase of land and in the creation of mortgages, easements, and other incumbrances. They are manifestly of such a nature that only the particular official or bureau within whose district the thing lies or the right is to arise can be considered competent (see § 313, German Civil Code).

Thus the rule of "*locus regit actum*" must give way where real rights in land are in question. These rights, for reasons already indicated, go hand in hand with the law of the particular state.

II. *The rule as stated above is generally recognized.*

1. Art. 11, German Introductory Act, enacts it expressly:—

"The form of a legal transaction is governed by the laws which are authoritative for the legal relationship to be created thereby. However, the observance of the law of the place at which the transaction takes place, will be deemed sufficient."

The provision of Paragraph 1, Sentence 2, does not apply to a transaction by which a right in a thing is created or dealt with.

2. The Japanese statute (*Ho-rei*), upon the application of the laws in general, contains virtually the same provision (Art. 8).

3. Laurent's draft for a new Belgian Civil Code provides (Art. 24):—

"Formalities prescribed in the interest of third persons for the transfer of property or of personal and real rights are governed by territorial law."

§ 96. Ownership and Possession.

1. *The lex rei sitæ applies to all of the following matters:—*

1. The nature and range of ownership. Thus, were the socialistic theory of ownership to be adopted somewhere and an alien were to acquire property within such state, or bring movables belonging to him therein, they would become subject to that system.

2. The question whether an object or piece of land may be the subject of ownership.

3. The question whether lost or ownerless things become the property of the finder (or occupier).

4. The question of expropriation.

5. The question of the statutory limitation of ownership rights.

Rules upon such questions as these would have no meaning and would fail of their purpose were they not applied also to alien owners, though ownership of land in itself is upon principle open to aliens or natives, residents or non-residents.

6. Statutory provisions upon the classification of things, *e.g.* as to what are movables and what are immovables.

7. The accomplishment of a change of ownership.

8. Rights of possession and the kind of actions maintainable for possession and for title. The requisites for the maintenance of such actions are dependent upon the conceptions of ownership. Here belong such questions as these:—

(a) whether an action analogous to the Roman *vindication (actio publiciana)* be permissible;

(b) whether the person in possession be liable for his enrichment or for the usufruct. See also § 97, *infra*.

9. Provisions limiting the division of landed property for certain economic or socio-political reasons (see Mill's "Political Economy," vol. i, book ii, chap. v).

10. The usufruct of land.

11. The question of the extent and duration of servitudes and incumbrances. Here the law of the servient tenement will control.

12. The question of the extent and abolition of real rights having their source in Germanic legal conceptions, such as:—

(a) rights of hunting and fishing,

(b) rights of entail or feu-rights.

§ 97. Limitation of Vindication in Respect of Movable Things.

v. Bar, I, pp. 633-637.

1. *If vindication be prohibited at the place of acquiring movables, the limitation must be recognized everywhere. The lex rei sitæ is thus applied as the law of the place of acquisition.*

1. In the interest of commerce, even though it be *contra rationem juris* and contrary to the Roman law, vindication of movables is frequently prohibited or limited in the interests of *bona fide* purchasers.

Where a person has purchased a movable thing in a foreign country, he may rely upon the foreign law, even though there be no prohibition or limitation upon the former owner's right of vindication at the purchaser's place of domicile or in the *lex fori*.

2. This is not altered by the fact that the possessor may be compelled to deliver title in another state on account of a kind of amortization proceeding; nor by the fact that one has voluntarily or by reason of police compulsion deposited a movable in a foreign state. The law applicable is and remains the law of the place of acquisition.

3. Conversely, the defendant cannot take advantage of limitations existing only by the *lex fori* and not by the law of acquisition. Savigny, it is true (viii, p. 187), was of the opinion that prosecution of ownership by action was a matter to be judged by the *lex fori*. But we are not dealing with a rule of procedure when the owner is confronted with an attack upon his rights; in other words, it is a question of substantive law. Opposed to Savigny's view is Keller ("*Pand.*," § 12, p. 21, note 3). We must be careful not to be deceived by the fact that limitations upon ownership are frequently clothed in the dress of rules of procedure.

II. *The lex rei sitæ also controls the following questions connected with this topic:—*

1. whether the purchaser is in *bona* or *mala fide* (German Imp. Ct., Civ. Cases, vi, p. 17);

2. whether the thing was really lost or stolen (here a foreign penal judgment may be of importance);

3. whether the purchase permits of a vindication only upon repayment of the purchase price, and whether it be material that the thing was acquired at a market or fair, or from a merchant handling that particular kind of goods;

4. whether the time has elapsed within which the purchaser has a conditional right of ownership (3 years according to Art. 2219, French *Code civ.*; 2 years, Art. 2146, Italian *Codice civ.*; 5 years, Art. 206, Swiss Code of Obligations). This period is not a limitation of action, notwithstanding it has been placed systematically under that heading in the French and Italian codes. After the period has elapsed, the right of ownership becomes absolute; the contingency disappears. But even if it were a limitation of action, it would be governed by the law to which the issue was substantively subject (§ 56, *supra*).

In America and England

The term "vindication" as employed by the author refers to the right accorded to the vendor against unpaid goods in countries having the Roman system of law. The Roman law did not generally consider the transfer of property to be complete by sale and delivery alone, unless the vendor agreed to give a general credit to the purchaser. This right is, of course, not recognized in England or America, although the right of *stoppage in transitu* approaches it closely. It is generally held that the right of stoppage is not dependent upon the *lex situs*, but upon that of the domicile of the vendor. This is especially the case where the route of the goods is through several countries (*Inslee v. Lane*, 57 N.H. 454. *Whiston v. Stodder*, 8 Martin (La.) 95; *Inglis v. Usherwood*, 1 East (Eng.) 515). Story was inclined to hold the *lex loci contractus* as authoritative in such a case (§§ 322-340). The courts sometimes adopt the fiction that the legal site of the goods still remains in the state of the owner's domicile (*Paradise v. Farmers' Bank*, 5 La. Ann. R. 710).

§ 98. Prescription.

v. Bar, i, pp. 637-640.

I. *Prescription of immovables is universally held to be governed by the lex rei sitæ.*

II. *The lex rei sitæ should also govern the prescription of movables.*

In regard to Rule II there is a difference of opinion, especially upon the following points:—

1. whether the *lex rei sitæ* should control in preference to the *lex domicilii* of the person in possession ;
2. whether a distinction must be made between the limitation of real actions and prescription. The question becomes practical because the terms for prescription are sometimes different than for limitation (England, 10 years ; German Civil Code, § 937, 10 years ; France, 5 years ; certain Swiss cantons, 2 years).

Upon principle the *lex rei sitæ* should govern the prescription of movables, as the basis of prescription is continued possession. Von Bar ("*Lehrbuch*," p. 97) is of the opinion that *here* the domiciliary law of the possessor should be authoritative, but that he may rely upon the *lex rei sitæ*, if he can prove that during the whole period provided by the *lex rei sitæ* it was within the jurisdiction of that law.

III. *Where a change of domicile has taken place, the time of prescription should be reckoned proportionately.*

Of course, where prescription has already been completed in the jurisdiction where the thing was situated, a change of domicile is unimportant. But where it has not been completed, the question will arise whether that law governs which obtains at the place where the thing was last, or where it was first, or whether an average shall be made.

1. The view that the law of the last place shall control has two objections :—
 - (a) there is no reason of justice why the law of the last place should be preferred ;
 - (b) a thing for which prescription has not yet been completed could become at once the property of the possessor by reason of a judicious change of domicile.
2. A second view makes a prescription commenced under one system of law continue, notwithstanding a removal of the thing. This solution was proposed in the draft of the German Code (§ 10), but was not adopted in the Introductory Act. It is, however, to be found in § 791 of the Property Code of Montenegro, which also states, "The law of this place (the first) governs also for the completion of the prescription and for all relationships arising therefrom." Accordingly, if the possessor resided at first in a country in which movables were prescribed in three years, and after one year removed to a country having a one-year period, there would still be two years necessary to complete prescription.
3. A third view is to reckon the period that has already elapsed

proportionately. In the example above taken, the year elapsed would be counted as one-third of the time, and therefore, after the change of domicile, the possessor would still require possession for two-thirds of a year, or eight months. This view seems theoretically correct; by averaging the time (*accessio temporis*) recognition is accorded to the international commonwealth of law.

In America and England

Prescription must be distinguished from limitation of actions. The latter bars rights *in personam* only; the former determines whether or not the possessor or occupier has acquired a right *in rem* by lapse of time. It is settled that prescription will be determined by the *lex situs*, although, in the nature of things, this will usually coincide with the *lex fori*, as the action will be brought, more often than not, at the place where the thing is located (*Hicks v. Powell*, L. R. 4 Ch. 741; *Pitt v. Dacre*, 3 Ch. D. 295).

With regard to the question discussed by the author as to the effect of a change of the *situs*, it is held that only when prescription has been completed at the old *situs* will the title be considered fixed. In such a case, then, the title will not be divested by the removal of the thing to a jurisdiction having a longer period of prescription (*Brent v. Chapman*, 5 Cranch 358; *Shelby v. Guy*, 11 Wheat. 361; *Waters v. Barton*, 1 Cold. (Tenn.) 43).

§ 99. Rights of Pledge in Movables and Choses in Action.

v. Bar, i, pp. 644-658.

I. *For determining the legal interpretation of rights of pledge in movables, the lex rei sitæ at the time of pledge is controlling.*

As a practical matter, this law will usually be identical with the *lex domicilii* of the debtor. The principle has been enunciated by the German Supreme Court of Commerce (xi, p. 24).

1. A vested right of pledge does not abate if the thing is taken into another jurisdiction, where such a right is not recognized. That is to say, legal transactions concluded in accordance with the law of the former location must be respected.
2. This is exclusive of prohibitory laws or rules of an absolute territorial nature. Where *general* rights of pledge in movables (*i.e.* without specifying the things and without change of possession) are unknown, the exercise of the right is, of course, inconceivable (Seuffert, xxxi, No. 194). Thus, for instance, if a valid

pledge has been made in a jurisdiction where no change of possession is necessary, and the debtor takes the object to a state which demands transfer of possession, the right of pledge continues, but its effect has been suspended. If the debtor returns to the original state, or removes to a state which does not require the transfer, the right reattains its actionary power.

3. The rule applies also to dead pledge.

II. *The distraint of rights (choses in action) is governed by the lex domicilii of the debtor.*

The question arising here is whether the obligation still exists after a distraint in favor of the first creditor; the distraint of the chose in action may eventually involve a transfer (compare § 110, *infra*).

1. To the class of cases where it does not, belongs distraint of insurance policies not payable to the bearer. In this case the act of distraint proceeds according to the rules of the law of things.
2. Distraint of claims secured by hypothec are also subject to the *lex rei sitæ*.

In America and England

The doctrine stated at II *supra* has been followed by many courts upon the theory that the situs of the debtor's *obligation*, in contradistinction to the creditor's *right*, is at the debtor's domicile (King *v.* Cross, 175 U.S. 396; Lerkin *v.* Wilson, 106 Mass. 120). But for the purpose of the distraint, the situs may also be treated as being in any State in which the debtor may be found (Morgan *v.* Neville, 74 Pa. St. 52, 57; R.R. *v.* Sturm, 174 U.S. 710. *Contra*, R.R. *v.* Nash, 118 Ala. 477). A complete résumé of the various theories prevailing in America may be found in Minor, "Conflict of Laws," pp. 285-290.

§ 100. Rights of Pledge in Immovables.

I. *The lex rei sitæ governs contractual rights of pledge.*

1. This principle applies:—
 - (a) To the existence, range, and rank of rights of pledge. This is with the reservation that the duty to grant a right of pledge arises from a contractual obligation.
 - (b) To the form of creating the right. Real rights in land can

be created only in the manner provided at the *situs* of the land. The observance of another form can, under certain circumstances, be the basis of a right to a hypothec.

(c) To the notification recalling the hypothec loan.

- a. Where a right of lien or pledge in immovables extends into another jurisdiction (*e.g.* the parts and appurtenances), the system of law prevailing at the location of the main object will govern. Such cases are easily possible internationally (and between states and cantons) under modern conditions; examples are furnished by electric plants with their branch installations, or primary and secondary stations, by pipe lines for water and gas. The distance is immaterial so long as there is an uninterrupted connection between the land and the thing; also whether the connection is horizontal or vertical, or if the thing be in the same or different jurisdiction as the land. The German Imperial Court declared a pipe line extending throughout a whole communal district as part of the land on which gas works were erected (Civ. Cases, vol. 39, pp. 204-208); and likewise with respect to an electric light establishment which had a network of conductors taking the current from the brushes at the central station (Imp. Ct., Civ. Cases, vol. 48, p. 267).

Difficulties arise where the conception of appurtenances is made so narrow as to embrace only whatever lies with, in, or upon a piece of land (Zurich Code of Private Law, § 55, *c*). Based upon this section, the Supreme Court of Zurich declared that distraint was excluded from whatever objects lay outside of the main establishment. The rule cited really cuts off a broader view of appurtenances. The court itself said that this condition of the law was insufficient for the needs of modern times; technical possibilities of distributing power with costly establishments should be recognized economically so as to constitute units for obtaining credit through pledge or distraint (*H. E.*, xii, pp. 91-93, and xx, pp. 281-285). The will of the parties alone is not authoritative here, because, as a rule, fixed requisites are provided.

II. *Rights of pledge by operation of law are governed exclusively by the lex rei sitæ.*

Examples of these are furnished by rights given to married women and minors in countries under French law (Art. 2135, *Code civ.*).

III. *Rights of pledge and distraint in railroads involve peculiar questions not within the scope of this treatise.*

IV. *Rights of pledge over seagoing ships will be considered under International Maritime Law (§ 202, infra).*

§ 101. **Roguin's Project to regulate the International Law of Things.**

At the third Conference of The Hague, Roguin presented a proposition to regulate the conflict of laws in regard to things, bearing the title, "*Dispositions sur les droits réels.*" The subject has not yet been disposed of. The project is reported in *Actes de la troisième conférence de la Haye*, 1900, p. 67.

LAW OF OBLIGATIONS

102. Introductory Remarks.

I. In order to obtain a general view of the various theories adopted by the nations individually as to the rights and duties of aliens in the inland and of natives abroad, reference may again be made to § 7, *supra*.

II. In regard to status in connection with the law of obligations it may be noted:—

1. that the discussions at §§ 57 *et seq.* apply here;
2. that especially in the law of obligations do Art. 7^a, Introductory Act (Ger.), and Art. 10^a, Fed. Stat. Pers. Cap. (Swiss), affect the application of territorial law;
3. that the law of England and America allows the *lex situs* to control in contracts relating to *immovables*.

All contracts relating to land are governed by the *lex situs* according to English law. This applies to the capacity to enter into such contracts as well as to all other questions relating thereto (see Dicey, p. 759). The rule is somewhat differently stated by Westlake, who (at § 216, 3d ed.) says, "Contracts relating to *immovables* are governed by their proper law as contracts, so far as the *lex situs* of the *immovables* does not prevent their being carried into execution." In this way a different system of law could become applicable under certain circumstances, as for instance the *lex loci contractus*. Compare also pp. 770 and 771, Dicey.

III. The personal statute of the obligee, just as that of the obligor, is, under this head, regularly determined by the law of the domicile, with respect of substantive propositions of law. The domicile being the central point of commercial life, it plays a most important part in the law of contracts.

IV. Material to be drawn from legislation is rather scant.

A. Positive Law

1. The French *Code civil*, with the exception of Art. 3, contains no rules of conflict bearing upon the law of obligations.

2. The Italian *Disposizioni* contain provisions in Arts. 9 and 11. Incidentally we may, already at this place, refer to Art. 58, *Codice di commercio*.

3. The Austrian Civil Code contains two rules at §§ 36 and 37.

4. The German Introductory Act is silent upon the point, notwithstanding that the original draft of the law had proposed certain propositions (§§ 11-15).

In Birkmeyer's "Encyclopædia of Law" (1901), p. 372, Bernhöft states the situation upon the basis of the new imperial legislation to be as follows:—

"The law applicable to obligations is, in the first instance, that which the parties themselves intended that the transaction should be subject to. If this intention is not to be arrived at, the old question arises as to whether the law of the place of performance, or the personal law of the obligor, or perhaps even — at least in certain respects — the personal law of the obligee, is authoritative. The question is made even more complicated through the Introductory Act, as it is not clear whether the personal law is determined by nationality in regard to obligations, or by the domicile, as the action may be brought there."

5. The codes of some of the Swiss cantons contain certain provisions, *e.g.* Zurich, § 5; Zug, § 4; Schaffhausen, § 5; Aargau, § 11.

The law of Switzerland contains no direct statutory provision as to what substantive rules are applicable to its own citizens when entering into contractual obligations abroad (Art. 822_b, Code of Obligations, refers only to the law of bills). The Fed. Stat., *N. & A.*, refers to their position only in matters of the person, the family, and succession.

As the Swiss Code of Obligations now regulates transactions relating to movables, such former *cantonal* laws as excepted the case of an *agere in fraudem legis domesticæ* are repealed. However, the following is to be noted:—

- (a) that the Code of Obligations does not regulate every contract relating to movables;
- (b) that certain cantons have provided some particular formality for the purpose of making the transaction more solemn. Such rules still hold good, and are only limited to a certain extent by Art. 24, *N. & A.*

6. The Property Code of Montenegro contains the following provisions :—

“ Art. 792. Rights and obligations arising out of a contract are to be judged according to the laws of that place which the parties have designated, or which, judging from the nature of the transaction or other circumstances, they must have had in mind at the time of executing the contract, or which they would have designated had they thought of it.

“ This may be : the place of executing the contract, or the place of performance, or the place where the issue growing out of the contract is to be judged, or finally, that place which, from the circumstances prevailing, might be designated as the central point of the transaction. But this general rule applies only to rights *in personam* growing out of the transaction (871), while rights *in rem* arising therefrom remain subject to the law of the place where the thing is located.

“ Art. 793. Claims for damages in tort are to be judged by the laws of that place where the act occurred from which the damage arose, with the exception of those cases mentioned in Art. 796, *c.*”

7. The law of the Congo provides as follows (Hébettes *et* Petit, “ *Les Codes du Congo*,” 2d ed., p. 37):—

“ Art. 5. The form of transactions *inter vivos* is governed by the law of the place where they are to be performed. Nevertheless, transactions of a private nature may be undertaken in the form permitted by the national laws of all of the parties.

“ Unless a contrary intention of the parties appear, contracts are to be governed by the law of the place where they are concluded, in respect to their substance, their effect, and manner of proof.

“ Unilateral obligations (*quasi*-contracts, torts, or *quasi*-torts) are subject to the law of the place wherein the act occurred upon which the obligation is founded.”

8. The Japanese statute (*Ho-rei*) of 1898, upon the application of the laws in general, contains the following provision (Art. 7):—

“ The question as to which law shall be authoritative in determining the operation and validity of a legal transaction is governed by the intention of the parties.

“ If this intention cannot be established, the law of that place shall be authoritative where the transaction took place.”

Further, Art. 12 provides :—

“ The validity of a transfer as against third persons is determined by the law of the debtor's domicile.”

B. Unofficial Projects

1. Domin-Petrushevecz, Arts. 194-196 (Meili, "*Die Kodifikation des int. Civ.- und Handelsrecht*," pp. 94-95).
2. Mommsen, §§ 6, 7, and 18 (*id.*, pp. 78, 81).
3. Dudley-Field, "Draft Outlines of an International Code," vol. i, Arts. 607 *et seq.*
4. Dicey. This jurist, at pp. 567-570, lays down the following propositions (rule 149, sub-rule 3):—

"In the absence of countervailing considerations, the following presumptions as to the proper law of a contract have effect:—

"*First Presumption.*—*Prima facie* the proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country.

"*Second Presumption.*—When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*)."

5. Laurent, particularly Arts. 14-17 ("*Kodif.*," p. 19).

In addition, reference may be made to the suggestions of the Belgian legislative committee (*id.*, p. 23).

C. Treaties

1. There are no treaties regulating the international law of obligations.

2. We might place under this heading the International Convention of 1890 upon railway freight traffic. But it is to be noted that this treaty established a *uniform* system of private law internationally, in respect to railway freight traffic. For this reason (with the exception of Art. 22) it does not attempt to create an understanding upon the *conflict* of laws.

3. Especially to be noted are:—

- (a) the proposed treaty of Lima, 1878 (*Kodif.*, pp. 91 *et seq.*);
- (b) the proposed treaty of Montevideo (*id.*, pp. 103 *et seq.*; Reps. of International American Conference, Washington, 1890).

§ 103. General Discussion. Review of the Various Theories.

Testa, *De inhoud der overeenkomsten in het internationaal privaatrecht* (Amsterdam, 1886).

I. In the law of obligations we are less restricted than in any other branch to the law of any *particular* territory. This is explained by the fact that the purposes intended to be accomplished by the parties may be set in motion and completed or performed at entirely different places. Of course there are certain groups of contracts in which we do find this local attachment to a particular place. Such, for instance, are obligations arising at fairs and markets.

II. The conflicts arising in the law of obligations are proportionately not so great as in other departments of the law. In fact we have here a kind of universal system, thanks to the excellent influence of the Roman Law. For this reason, it is not of such great practical signification that the parties should inquire as to precisely which objective system of law shall become applicable. In the international law of obligations, the *lex patriæ* plays a subaltern rôle. This is easily comprehensible, as in this department we are dealing with economic rather than with personal relations. It must be noted, however, that the Italian School, even in the law of obligations, found it proper to utilize the system of *lex patriæ*.

III. In the law of obligations, too, the attempt has frequently been made to develop a general theory or formula to which the entire domain may be referred. But it is doubtless true that the complex of questions arising here do not permit of being reduced to a uniform scheme.

The theories which have found support are the following :—

1. *The lex fori.* The Civil Code of the canton of Grisons contains the following provision at § 1 :—

“The provisions of this act apply :—

• • • • •

“3. in regard to the law of obligations : to all claims actionable in the courts of this jurisdiction according to the rules of procedure.”

The question of the application of substantive law is here confounded with that of jurisdiction.

2. *The lex loci contractus* or the law of the place where the obligation had its origin. This rule was already laid down by

Bartolus as authoritative; also by Paulus de Castro as being the birthplace of the *obligatio*, and by Rochus Curtius upon the theory of a tacit subjection by the parties. The Dutch School (P. Voet, sec. ix, chap. ii, Nos. 9, 10, 12, 13, 15) also expressed itself in its favor. In recent times, Kohler ("*Einführung in die Rechtswissenschaft*," 1902, p. 201) still thinks that the strongest grounds exist for the application of the law of the place of origin.

It must be confessed that the French theory and practice sets up the *lex loci contractus* as authoritative. England, too, considers it as the principal rule. Dicey, however, opposes the strict application of the principle. He points out that the determination of the question is dependent upon a whole array of circumstances. At p. 566 he says:—

. . . "that a variety of circumstances must be considered, such as the nature of the contract, the customs of the business, the place where the contract is made or is to be performed, and the like, any one of which may suggest conclusions as to the law likely to be intended by the parties; and English judges have constantly declined to tie themselves down by any rigid or narrow rule for determining the intention of the parties, or in effect, the proper law of the contract."

Dicey says at p. 570, "The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties." But it is further developed that when a contract is to be performed in whole or in part in another state, the conception of the English and American doctrine is also to the effect that the *lex loci solutionis* is to be considered. See pp. 571-572, 726-727, 762-768.

Certain transactions doubtless must be subjected to the *lex loci contractus*. Such, for instance, are obligations arising at fairs and markets. It is probably just because of the great concentration of traffic at these fairs and markets in former times that the older jurists generalized in favor of this system of law.

The *lex loci contractus* cannot be accepted as a general principle. The place at which a legal transaction is concluded is frequently merely accidental, and is not adapted as a basis to determine the application of the laws. A reference to business transacted upon a railway journey will suffice without mentioning the future navigation of the air.

The view supported by the legislation of Italy is remarkable. Art. 9, *Disposizioni*, provides:—

“The import and effect of obligations are to be considered as regulated by the law of the place where they were entered into, and, if the contracting parties are aliens belonging to one and the same nation, by the law of the latter country, excepting that in each case, a different intention may be proved to exist.”

From this rule of law it is evident that the legislation of Italy places the international law of obligations under the control of the following alternative standards:—

- (a) the so-called autonomy of the parties,
- (b) the *lex patriæ* if the parties belong to the same nation,
- (c) the *lex loci contractus*.

3. *The law prevailing at the domicile of the debtor.* See von Bar, ii, pp. 3, 17 (with the reservations at pp. 19, 23–25).

Von Bar advances the view that the law of the obligor's domicile is controlling. He bases this proposition upon the fact that the rules of law in the matter of obligations, which do not give way to the agreement of the parties, exist generally in the interest of the obligor. But this protection should not cease where a citizen enters into an obligation abroad or with an alien in the inland. Again, the place of performance is frequently the domicile of the obligor (v. Bar, ii, p. 13; “*Lehrbuch*,” pp. 108–109). The domiciliary law of the obligor (debtor) is thus set up as the *rule*.

As to bilateral obligations, von Bar proposes to apply the domiciliary law of *both* of the contracting parties (v. Bar, ii, pp. 14–17; “*Lehrbuch*,” p. 109).

The draft of the German Code also proposed the adoption of the personal statute of the debtor as a *principle*, with the reservation of a right of election to be hereafter mentioned (§ 11), but, as has already been stated, the proposition was not enacted into law.

4. *The lex solutionis, or the law of the place of performance* (Savigny, “*System*,” viii, pp. 209 *et seq.*).

This jurist defined the doctrine of the place of performance more particularly, in that he set up the following five rules (pp. 226, 227, 246, 247):—

- (a) where the obligation has a particular place of performance, the law of that place is, of course, authoritative;

- (b) where the obligation arose out of the conduct of a continuing business of the debtor, the law of the place controls wherein the business has its permanent seat ;
- (c) where the obligation arose out of a single transaction at the domicile of the obligor, the law of this place controls, notwithstanding a later change of domicile ;
- (d) where the obligation arose out of a single transaction away from the domicile of the obligor and under such circumstances that performance is to be expected at the same place, the law of that place will be applicable ;
- (e) where none of these conditions are present, the law of the obligor's (debtor's) domicile prevails.

Savigny ("System," viii, p. 208) points out that the performance is the essence of the obligation. Savigny's trend of thought is that an obligation arises from the fact that something which was formerly within the pleasure of the parties and uncertain has become compulsory and certain, and that this something is the performance. It represents the whole expectation of the parties. It is therefore the essence of the obligation that the place of performance should be the "seat" of the obligation.

The law of the place of performance has been accepted by many as theoretically correct, *e.g.* by Gierke ("*D. Priv. R.*," i, pp. 231-232) and by Regelsberger ("*Pand.*," i, p. 173). The latter states that the place of performance is regularly the stage upon which the effect of the obligation is to be determined. Regelsberger maintains that in regard to obligations of which the object is immovable property, the place of performance is pointed out by its very nature ; that this place is also clear in obligations entered into in the course of business at fairs, markets, and exchanges, or by a tourist or guest at a watering place. The practice of the courts has frequently been influenced by the law of the place of performance both in Germany and in Switzerland :—

Germany : Ct. of the Empire, March 1, 1882, *Entsch.*, vi, § 33, p. 131 ; Ct. of the Empire, July 8, 1882, *Entsch.*, ix, p. 227, No. 60 ; Sup. Ct. of Commerce, May 9, 1871, *Entsch.*, ii, p. 270 ; December 9, 1874, *Entsch.*, xv, § 62.

Switzerland : *A. E.*, xi, p. 364 ; xx, p. 1198 ; *H. E.*, xii, p. 75 ; xiii, p. 177 ; *id.*, pp. 144 and 215.

Other theories that have been advanced are as follows :—

5. That we must distinguish between :—

- (a) "*de his quæ oriuntur secundum ipsius contractus naturam tempore contractus*,"
- (b) "*aut de his quæ oriuntur ex post facto propter negligentiam vel moram*."

This is the view of Bartolus, Nos. 16 and 47.

6. That we must distinguish between :—

- (a) the effects of contracts ("*effets*"), and
- (b) their accidental results ("*suites accidentelles*").

7. That we must distinguish between :—

- (a) the *vinculum juris*, i.e. embracing questions of the requisites for the validity of contracts, their interpretation and their scope (here the *lex loci contractus* is applicable);
- (b) the *onus conventionis*, i.e. every thing that relates to the execution of the obligation (here the law of the place of performance is applicable).

The author of this theory is Pasquale Fiore (*Elementi*, 3d ed., p. 348).

8. That the *lex patriæ* is applicable where citizens of the same nation have concluded an obligatory transaction abroad. See Italian *Disposizioni*, Art. 9; Laurent's draft of Belgian Code, Art. 14.

9. The following formula has been suggested by von Bar (ii, p. 30):—

"In so far as contract obligations are to be determined by a foreign law, the determination must be in accordance with the nature of the subject, and must respect the mode of satisfying the contract which has been expressly or by implication provided by the parties. In so far as in this way neither the law of the place where the contract was made nor the law of the place of performance becomes applicable, each of the parties will be ruled by the law of the domicile, and in so far as the law which regulates the matter does not contain coercive provisions to the contrary, the parties are at liberty, either expressly or by implication, to subject themselves to another law."

10. According to the theory of Zitelmann (*Int. Privatr.*, i, pp. 125 *et seq.*) the *lex patriæ* would be exclusively applicable to the law of obligations except in matters of tort.

11. At the convention of German jurists in 1898, Enneccerus proposed the following scheme (*D. Jur. Zeitung*, 1898, ii, p. 417):—

- (a) The substance and effect of contractual obligations, in the absence of any rule of law to the contrary, are to be judged by that law which the parties have expressly or impliedly agreed shall be applicable.
- (b) In the event that no such intention of the parties exists or is recognizable, the law of the place of performance shall control.
- (c) Re-reference and further reference shall not be deemed applicable in the matter of contractual obligations.

§ 104. The Correct Doctrinary Standard.

I. It is impossible to set up a uniform and generally valid axiom, according to which all questions of conflict in matters of obligations may be resolved.

II. Especially in the law of obligations are the parties permitted to expressly subject themselves to a particular system of law, at least within the province left free to them by legislation. Compare § 54, *supra*.

Where a valid agreement has been made determining the law which is to be applicable, it no longer becomes necessary to study further as to what law might possibly apply.

III. Such an agreement may be predicated upon a tacit understanding if certain sufficient elements can be found pointing thereto.

1. The question whether the parties had in mind a particular law for the determination of an issue may often be discernible with considerable clearness, as, for instance, in contracts of service, loans, commission business.

2. This view is entertained also by the Swiss Federal Court (*A. E.*, xvii, p. 645). According to the constant practice of this court, it is the duty of the judge to apply that system of law which the parties have expressly or impliedly considered as authoritative at the time the contract was concluded (*A. E.*, xxiv, pt. 2, p. 544).

3. The later English and American doctrine is also in harmony with the statements under II and III.

Dicey, at p. 567, lays down the following principle (rule 149, sub-rule 1):—

“When the intention of the parties to a contract as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract and, in general, overrides every presumption. As the proper law of contract is fixed by the intention of the parties, their expressed intention with regard to it must (in general) be decisive.”

Moore, in summing up the general American practice, says, "A contract is governed by the law with a view to which it was made," and (p. 578) cites a decision of the United States Supreme Court which states:—

"The law . . . which is to decide upon the nature, interpretation and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting their obligation" (106 U.S. 124).

In accordance with such an express or implied agreement as we have discussed at II and III, it is possible that a system of law becomes applicable which would have played no rôle under the ordinary rules of International Private Law prevailing, in e.g.:—

- (a) the *lex fori*,
- (b) the *lex* of the domicile of one of the contracting parties,
- (c) the *lex patriæ*,
- (d) the *lex loci contractus*.

IV. Except as developed under II and III, the question of the application of the laws must be considered separately in every case.

The various rules laid down in theory can be employed only as guiding principles. We may briefly outline the detail as follows:—

1. As to the element of *nationality*. If the nationality of the contracting parties is the same, the application of the national law, as provided for in Art. 9, Italian "*Disposizioni*," seems reasonable, at least in Continental Europe. But one must be careful not to apply this rule in every case. It might occur, for instance, that a Swiss residing in Switzerland should enter into a contract with a person in London without knowing that that person was also a Swiss. In other words, the rule should be restricted to cases in which the parties are aware that they are countrymen.

2. As to the law of the *place of performance*. This law may properly be applied where it really has some connection with the performance of the obligation itself.

Two things must be kept distinct in considering the doctrine of the place of performance, viz.:—

- (a) the *subjective* submission to this system of law through the transactual will of the parties, and
- (b) the application of that formula by reason of *objective* law.

These different points of view are not infrequently confounded. This occurs, for example, in the work of Leonhard ("*Der allgemeine Teil des bürgerlichen Gesetzbuch*," etc., p. 25), wherein it is stated that the law of the place of performance justifies itself as the prevailing doctrine applicable to the interpretation of obligations, for the reason that the parties would naturally subject themselves to that law in seeking a particular system of law to serve for the protection of their rights.

The practice of the courts also frequently identifies these two points of view in saying, for example, that the objectively correct place of performance is the domicile of each of the contracting parties for the obligations respectively undertaken by them, unless there be a contrary stipulation of the parties (*e.g. A. E.*, xxiv, pt. 2, p. 436). The doctrine of the *lex solutionis* resembles nothing so much as a large reservoir in the way in which it is turned to account in International Law.

Against the too great accentuation of this formula it may also be urged that the parties are often ignorant of that particular system of law, that it is often difficult to determine what is the place of performance, and that there can be more than one place of performance.

3. As to the law of the *obligor's domicile*. This can doubtless be of great importance. As we have seen, it was the system proposed in the German draft (§ 11), but was not adopted in the act. It must be remembered that the domicile which controls is the one which existed at the time the obligation was entered into.

The domiciliary law is properly applied where grounds for the application of another system of law are lacking; especially is this so in matters of commercial business. The law existing at the domicile (place of business) of the debtor thus becomes authoritative. It is often said that this is true because the debtor must be cited at that place—but this categorical reasoning again involves a confusion of *forum* and *jus*.

V. Bilateral obligations should also be treated in accordance with the above discussions. A dissecting of the relationship so as to submit the obligations on both sides to different systems of law, cannot be considered proper.

1. The solution proposed by Savigny (viii, p. 202) is very inviting and coincides with the view of the Roman Law as to the origin

of obligations. The relation between the performances on both sides, in a bilateral contract, has frequently been discussed in theory. *One* conception views the mutual obligations of the parties as a unity, a mixed obligation made up of performance and counter-performance. *Another* view considers the origin and existence of the duties on both sides to be independent of one another, so that one may be made effectual without the other. A *third* view considers the one obligation conditioned upon the other. This last view is the correct one in theory, viz. that the rights and duties arising out of a bilateral obligatory transaction stand in a relationship of mutual dependence and operation.

It is true that the bisecting of a bilateral obligation has the advantage of simplicity and handiness; but, as we shall see, it does not create a satisfying legal situation. The German draft, however, adopted it by enacting a peculiar right of election.

Section 11, in the two drafts was as follows:—

“If both contracting parties be obligors, each party may demand that his obligation shall be judged by the same law as is authoritative for that of the other party.”

“If obligations for both parties arise out of a contract, and are subject to laws of different places, each party may demand that his obligation be judged by the law applicable to the obligation of the other party.”

But neither the one nor the other provision was enacted into the Introductory Act.

It is certainly difficult, in the absence of agreement, to determine what law shall be applicable to the rights and duties of both sides in a bilateral contract. There is no neutral point to govern us here, and all effort would seem to be in vain. The result of bisecting the contract would be as follows:—

- (a) that two different objective systems of law are applicable to the same legal relationship;
- (b) that there are two distinct places of performance;
- (c) that each of the parties is subject to the law of his own domicile as to *his* part of the obligation.

The dissecting of a bilateral contract into two parts and the subjection of the parties to two different systems of legislation is also discussed by Dicey, pp. 572–573: “A contract is made in one country, and is to be performed, as regards the obligation of one of

the parties, wholly in that country and as regards the obligation of the other wholly in another country, as where A agrees to deliver goods to X in Liverpool, and X agrees to pay for them in New York. *The contract may be treated as two contracts*, the one to be performed by A in England and the other by X in New York. *It is then reasonable at any rate to assume* (though the presumption is by no means conclusive) that on the one hand the delivery, etc., of the goods (*i.e.* the performance of A's share of the contract) is governed by the law of England, and on the other hand the payment for the goods, *i.e.* the performance of X's part of the contract, is governed by the law of New York."

No case is cited to show that the principle has been adopted by the courts in England or the United States. He maintains, however, that in this way many difficulties may be avoided (p. 572, note 3):—

"Many difficulties as to the proper law of contract are removed by noticing that what is called 'a contract' is often in effect a set of two or more contracts, and the proper law of these several contracts may be different."

2. Against the view subjecting each of the parties to the law of his own personal statute, more particularly that of his domicile, is the objection that there would frequently be no real consensus; the obligations as interpreted separately by each system of law might give a discrepant result, as, for instance, where the personal statute of the buyer throws upon him the risk of the object sold, while the personal statute of the seller throws it upon *him*. It may thus happen that one party might be entitled to demand performance, while he himself is not bound at all. The sections just cited from the German drafts intended to circumvent this by an election of law.

3. The practice of the courts varies greatly in this matter.

- (a) The German Supreme Court of Commerce has frequently stated that it will not permit the dissection of obligations in accordance with the nature of the duties to be performed (Reports, xii, p. 286, and xix, p. 132).
- (b) The Commercial Court of the Canton of Zurich at one time denied that one of the parties could be subjected to one system of law and the other to a different one (Ullmer, Suppl. No. 2696). At the present time, however, the court follows

the view that "justice and the nature of things" require that both obligations be separately determined by the law of the domicile of each obligor *qua* the place of performance.

- (c) The German Imperial Court, with a reference to Savigny (viii, p. 202), has supported the view that the application of laws may be considered separately under certain circumstances in bilateral transactions (Civ. Cases, xxxiv, p. 191).
- (d) The Swiss Federal Court, though formerly against the view (*A. E.*, xi, p. 365) now seems to favor the system of analysis (*A. E.*, xxiv, pt. 2, p. 436). At least this seems deducible from the opinion of the court. The controversy in which the point arose, grew out of an obligation which a Swiss firm had entered into with an English house, not to sell goods purchased of the latter below a certain price, under a penalty of a forfeiture. The court said:—

"In the absence of a contrary stipulation of the parties, it is to be taken that the import and legal effect of the transaction executed by them was intended to be subjected to the law of the country in which the obligations established thereby were to be performed. So that also as to whether the defendants were guilty of a breach of contract and as to what results are to flow therefrom are determinable by Swiss law."

But at the very most, this solution is correct only in a certain line of cases, viz. where the contract consists of an offer and acceptance between parties at different places.

VI. In order to arrive nearer the truth, it is necessary to distinguish the various kinds of obligations just as we do in domestic law. In fact it may be said, generally, that the science of our topic can be directed along the right track only by observing the classification followed in domestic civil law and by using it as a guide.

1. The principal classifications of obligations are each subject to different rules.

2. One of the principal classifications to be observed in accordance with this statement is, of course:—

- (a) obligations *ex contractu*,
- (b) obligations *ex delicto*.

3. A further important distinction is between the following:—

- (a) unilateral obligations (with possible mutuality),
- (b) bilateral obligations,
- (c) obligations with a particular local relationship, e.g.:—
(ua) obligations at markets and fairs,

- (bb) certain obligations in the purchase and exchange of immovables,
- (cc) contracts of letting and hiring in regard to immovables,
- (dd) contract for work to be done upon immovables.

It is necessary to realize, right from the start, that in this division of the law, it is not possible to deduce any settled rule, except perhaps the rule that all matters of obligation cannot be treated according to one and the same principle!

In the paper of von Seeler upon the question, "According to what local law shall contractual obligations be judged in International Private Law?" (Reps. xxiv, *Juristentag*, pp. 33-52), the writer arrives at the result that it is premature to give a positive answer to the question. He therefore notes "with satisfaction" the fact that the German legislature postponed a conclusion in regard to contractual obligations; he appeals to science, which should strive for a solution on its own account (p. 51). The "guiding stars" to science in this matter should be "the end and purpose of the particular rule, the spirit of the domestic law, the accomplishment of justice, the necessity for *bona fides*, *æquitas*, and *utilitas* and the requirements of international intercourse" (p. 52). These are rather many guiding stars, although all taken together they hardly shed sufficient light upon the problem in hand.

§ 105. Legislative Proposals for the Regulation of the International Law of Obligations.

I. *Roguin proposed a treaty at the Third International Conference held at The Hague (1900) for the regulation of the International Law of Obligations.*

The draft was entitled: "*Dispositions sur les obligations*" (*Actes de la troisième Conférence*, 1900, pp. 61 *et seq.*), but as it was not disposed of at the conference, it will not be quoted here.

II. *The proposals of the Institute of International Law.*

The Institute adopted provisions laid before it by von Bar and Harburger (*Annuaire*, xviii, p. 50) to regulate the conflict of laws in regard to obligations.

III. *The draft of the Swiss Civil Code.*

The committee for the draft of a new Civil Code for Switzerland, which is still engaged with its task, adopted a legal formula characterized by a most astounding simplicity. It is printed under

the closing title, "Provisions for Application and Transition" (iv, p. 251), and provides as follows:—

"The provisions of the (Swiss) Code of Obligations are applicable to all matters where performance is to be made in Switzerland, unless a different intention of the parties can be proved to exist."

I have opposed the adoption of this rule in my treatise on the codification of Swiss law, private and penal (p. 120). It is even much more extreme than Savigny's doctrine of the place of performance, not to speak of the fact that it is naturally impossible to regulate the entire international law of obligations through this *one* article.

GENERAL QUESTIONS OF THE LAW OF OBLIGATIONS

§ 106. Contractual Obligations in General.

v. Bar, ii, pp. 30 *et seq.*

I. *The legality of the obligation.*

In general it may be said that a transaction (more particularly a contract) valid according to the law of the place where it was executed, must be recognized everywhere unless there be an express provision of law to the contrary, or its import be absolutely unlawful or immoral. We frequently speak of the application of foreign legislation upon private law, but if we examine more deeply into the question, we shall see that it is often rather a recognition or denial of rights which are subject to foreign laws. This is especially so in the matter of contractual obligations.

1. The question may arise as to whether an obligation must be considered as unlawful because in contravention of a particular rule of law of a foreign country. If the transaction contravenes a command or prohibition which is generally recognized among civilized nations, the contract will clearly not be enforced. For example:—

- (a) Contracts made in contravention of laws of a fiscal nature even though of a foreign state (*e.g.* customs laws) will not be enforced. Early authors were often of the opinion that such transactions were valid, but the international commonwealth of laws as it exists to-day will hardly lend itself to circumvention. At all events such contracts as involve a *fraud* upon the customs officers are unenforceable. In this connection reference is to be had to the decision of the *Cour de Bruxelles* in 1886 (*Revue de dr. i.*, xxix, p. 277), in which the following is said:—

"Contracts in aid of smuggling contravene not only the fiscal laws of the particular foreign state, but also the conceptions of right and justice which ought to dominate international relations; they undermine commercial honesty and constitute acts of unfair competition against the interests of the citizens of our state, who, more scrupulous in their dealings, pay the customs dues in importing their merchandise into neighboring states."

See also Dicey-Stocquart, "*Le statut personnel anglais*," i, p. 333 (Dicey on Domicile).

- (b) Contracts involving transactions prohibited by foreign statutes against usury will not be enforced if contravening the law of the place of payment. Where, for example, usurious transactions (*e.g.* loan, silent partnership) are arranged for in Germany to go into effect in France, they are enforceable neither in the one place nor in the other, notwithstanding that they do not contravene the usury laws at the place where the action is brought (Germany), provided they contravene those of the place where the contract is to be performed (France).
- (c) Such contracts (*e.g.* loan, contract of association) as would be considered objectionable by the local state if intended to be performed there, are also unenforceable even though intended to further a traffic forbidden by the penal laws of a *foreign* country.

2. Recognition will not be afforded to contracts which, according to a generally existing international standard, obviously offend good morals, even though the law of the place of performance happens to permit of them, provided the place of performance does not; and conversely.

3. Internal provisions making claims growing out of games or wagers unenforceable, cannot *ipso facto* be considered as prohibitive or coercive rules. This is especially the case with regard to games having physical development for their object (Art. 1966, French Civil Code). But contracts entered into in the course of play at gambling rooms (*e.g.* at Monaco) are void and will not be enforced extra-territorially.

II. *Defects in the creation of the contract.*

The system of law which is authoritative in this respect is that to which the obligation, as such, is subjected. This applies to the following questions:—

1. As to whether a transaction be invalid on account of fraud, duress, or mistake. These are *not* independent elements, juristi-

cally separate from the rest of the transaction and therefore to be judged by the law of the place of their occurrence. They are identified with the obligatory relationship, as such, and are therefore dependent upon the law which governs the obligation. By way of objection, it might be urged that there *is* no obligation, as contracts thus affected are invalid or void; but they only *become* void after successful contest, and valid after the parties are precluded from attacking them. This is particularly the standpoint of Swiss law.

2. The question of hypnotic suggestion. This seldom arises in civil law. In a long period of practice I have never had occasion to set up this plea.

3. The defence of excessive inequivalence (*laesio enormis*). Even though the *lex fori* does not contain this ground of defence, it should be recognized if the law to which the obligation is subject permits of it. It may be said, incidentally, that the doctrine exists in the laws of France (Civil Code, § 1131) and Austria (Civil Code, § 934), but not in the laws of Germany and Switzerland.

4. The question as to whether a transaction was intended in earnest or merely simulated.

III. "Strengthening" the obligation.

1. Questions of forfeiture are subject to the law which governs the main obligation. We have here a "little institute of correction" (Savigny, "*Obligationenrecht*," ii, p. 273), established by the will of the parties, in order to enlarge and strengthen the contract in the event of unsuccessful, insufficient, or untimely performance. Liquidated damages are merely accessory to the principal obligation (German Sup. Ct. of Commerce, xvi, pp. 15-16), and therefore, upon principle, the law applicable to the latter must govern. The question is important, because liquidated damages are frequently agreed upon in large transactions.

Where a sale is made with the agreement that the goods shall be used exclusively in a certain way, and this duty then insured by a provision for liquidated damages, a breach should be judged by the law authoritative upon the contract of sale. It is a matter concerning a breach of the contract, and not a tort.

2. The law to which the obligation itself is subject also determines the import and effect of a joint obligation entered into by several persons. The significance of construing an obligation as

joint and several for the benefit of the creditor is everywhere recognized. The Austrian Civil Code contains the following provision, § 891 :—

“Where several persons enter into a promise whereby one expressly obligates himself for all and all for one, each person must severally answer for the whole. It depends, therefore, upon the creditor whether he will demand the whole from all or several of the joint debtors, or only a part selected by him, or whether he will demand it from one alone. Even after beginning an action, he may make this election ; and if he has received satisfaction only in part from one or another joint debtor, he may demand the remainder from the others.”

This provision (see Unger, “*System*,” ii, § 128 and note 17) is a rule of procedure as well as of substantive law. During the pendency of the action against one joint debtor, a second debtor should not be subject to citation, although the citing of all joint debtors in one action is permissible. The above rule of procedure applies only to the internal state, as (in Austria) an alien joint debtor may be sued only at the place of jurisdiction of his person. The practical application of the rule naturally presupposes that the citing of all the joint debtors is possible in Austria. If this were otherwise, the joint nature of the obligation for the benefit of the debtor would be lost, at least if the interruption of the running of the statute of limitations were not held to result from the commencement of an action against one joint debtor. Neither is Art. 155 of the Code of Obligations (Swiss), according to which the action against each joint debtor becomes outlawed independently, applicable where the debtor cannot be cited in the local state.

3. Suretyship will be specially discussed under § 111, *infra*.

IV. *Alteration of the obligation through fraud, negligence, or delay.*

Here, again, the same law governs as that to which the obligatory relationship itself is subject.

1. Questions of fraud (*dolus*), negligence (*culpa*), or delay (*mora*), so far as they effect modifications of the contractual relationship, are not judged by the law of the place where the acts constituting them occurred, but are regulated by the law to which the obligation itself is subject. They are not matters independent of the contractual will of the parties, nor do they constitute sepa-

rate obligatory relationships. The question is whether one of the contracting parties is abiding by the contract. It is the law to which the issue generally is subject that must determine whether the parties have performed a duty impressed upon them by the contract or by law. This is true, even in regard to a claim arising out of "*tort moral*," if it be not an independent claim in tort, but essentially a part of a contractual demand (*A. E.*, xvii, p. 646).

2. The legal results of delay are also determined by the law regulating the obligation. Especially where the law favors the theory of the place of performance in the law of obligations, may it be said that this law also determines the results of delay.

In this connection (Nos. 1 and 2), Foelix and the ancient author, Bartolus, express a different opinion.

Bartolus says that the place where action is brought should govern, because it is there where the party is guilty of negligence or delay ("*inspicitur locus ubi petitur, quia ibi est contracta negligentia seu mora*"). But this is incorrect. To show how unfair such a rule would be in practice, the case may be cited of a Frenchman entering into a contract of sale with a Swiss, the latter then delaying in the payment of the purchase price. If Swiss law is to govern, the former can himself declare the transaction as null (Code of Obligations, Art. 122); if French law, only the court has this power. It would be manifestly unfair to give the parties the power of altering their rights according to the forum chosen. By adhering to the rule previously laid down as being the correct one, the system of law governing their rights and duties is indicated from the time of entering into the contract.

3. The same reasoning applies to the cessation of the obligation through an accident, *e.g.* destruction of the subject-matter of the contract.

4. It may occur that a new contract be made with reference to an old one, perhaps just in view of the fact that one of the parties has been guilty of *dolus* or *culpa*.

The new contract is to be considered independently, and that objective system of law is to be applied to which it is subject according to the rules of conflict, although the new contract be identified economically with the former relationship. Such, for example, may be:—

- (a) a contract for the purchase of land in Berlin, followed by a contract in Paris, called forth by a repentance of it ;
- (b) assumption in one country of a debt incurred in another ;
- (c) a novation under similar circumstances.

V. *Conditional contracts.*

In conditional contracts, the question of the cumbency or default of the condition is determined by the law to which the transaction generally is subject. Doubtless, the import of a condition may be such as to be referable to a different system of law (*e.g.* that of the place of performance). Thus, where a promise is subject to the condition that the other contracting party acquire citizenship in State X, it is clear that the law of the latter state must determine whether the condition has been fulfilled, although the transaction be subject to another law in all other respects.

VI. *Devolution of the obligation.*

The question of the devolution of the obligation upon the heirs is governed theoretically by the law to which the obligation is subject. But as the law determining the succession is frequently different from that governing the obligation, we find the opinion supported in practice that the heirs shall be liable for obligations of the testator only when *both* laws, viz. that of the obligation and that of the estate, are in harmony upon that point. Art. 24₂ of the German Introductory Act expresses this as follows:—

“Where a German has had his domicile at the time of his decease in a foreign country, his heirs may also rely upon the laws prevailing at such domicile to determine their liability for the obligations of the estate.”

§ 107. *Set-off, or Compensation.*

I. Compensation is in the nature of a performance or satisfaction of the obligation. Upon principle, the law which governs an obligatory relationship is also authoritative for the question whether this relationship still continues in effect, or whether, e.g., it has been dissolved by compensation.

A change of domicile by the obligor or prosecution of the rights arising under an obligation at a different place than that to the law of which the obligation is generally subject, should not be permitted to be the means of subjecting the permissibility of a set-off or compensation to other rules of law. It is therefore

unsound to apply the *lex fori*, as proposed by Story, § 576, and still followed in English and American practice.

Supposing that an obligation be governed by the laws of France, the question of a set-off should also be determined by French law, notwithstanding that the action be brought at Zurich. The French *Code Civil*, at Art. 1291, contrary to Art. 131 of the Swiss Code of Obligations, demands that both claims must be "*également liquides et exigibles*."

I do not understand how it is contended in earnest that set-off can be looked upon as part of the remedy. The Court of the German Empire (xxvi, p. 66) well says that the requisites determining a set-off should be governed by the same law as is authoritative for the claim itself, *i.e.* the debt, the extinction of which, in whole or in part, is claimed through set-off.

II. *The inadmissibility of a set-off may result from certain peculiarities in the relations of the parties.*

According to statutes in some countries this may result :—

- (a) where there is an understanding between the parties that there shall be no set-off. Thus, by Art. 139 of the Swiss Code of Obligations, a promise to pay in cash after the debtor has had knowledge of a counter claim, will be held a waiver of his right to compensate ;
- (b) from the nature of the obligation itself. Thus, by the Prussian State Law (i, p. 16, § 366) and the Swiss Code of Obligations (Art. 132), set-off is not permissible against obligations for the return of things wrongfully withheld, for aliment, etc.

This quality should therefore remain with the obligation, no matter in what country it is enforced.

III. *The lex fori is applicable in some cases by way of exception.*

This is mainly the case in the law of bills. Cf. Art. 811, Code of Obligations.

In America and England

In these Jurisdictions the rule as stated by Story (§ 575) seems to be well settled : "As to set-off or compensation, it is held in the courts of common law that a set-off to any action, allowed by the local law, is to be treated *as a part of the remedy* ; and that therefore it is admissible in claims between persons belonging to different states or countries (*i.e.* according to the *lex fori*), although it may

not be admissible by the law of the country where the debt which is sued was contracted" (Mineral Point R. Co. *v.* Barron, 83 Ill. 365; Bank *v.* Hemingway, 31 Ohio St. 168; Ruggles *v.* Keeler, 3 Johns. 263; Meyer *v.* Dresser, 33 L. J. C. P. 289).

A theoretical distinction may very properly be made between set-offs, which are in reality only defences, and those which are true claims against the plaintiff. In the latter case, the choice of law will be determined just as if it were an independent claim (Minor, "Conflict of Laws," p. 525). But it is submitted that where the principal obligation imports a denial of the right of set-off according to the interpretation given it, as, for instance, in respect of the negotiability of the instrument upon which it is founded, the standard of law should be that of the principal obligation and not that of the *lex fori*. This would approach the continental rule; in fact it has met with some approval in America (Pritchard *v.* Norton, 106 U.S. 124, 133; Stevens *v.* Gregg, 89 Ky. 461; Vermont Bank *v.* Porter, 5 Day (Ct.) 316). But there seems to be a tendency upon the part of American and English courts to shut out the application of foreign law in a certain line of cases by the use of the fiction that this matter also pertains to process. To illustrate: In some States of the Union, it is held that a scroll to a signature is equivalent to a seal, while in others, it is not. Where an instrument with such a scroll, made in a State supporting the former rule, is sued upon in a State supporting the latter, the defendant may plead want of consideration (Williams *v.* Haynes, 27 Ia. 251; Andrews *v.* Henriott, 4 Cowen (N.Y.) 508). The rule has also been applied in the converse case (Watson *v.* Brewster, 1 Barr (Pa.) 381). It is obvious here that the permissibility of the defence does not depend upon any rule of procedure, but upon a statutory requisite affecting the principal obligation itself.

§ 108. Payment of Interest.

v. Bar, ii, p. 56.

I. *The payment of interest by contractual agreement, being an accessory right to the leading obligation, is, upon principle, subject to the same system of law.*

It is quite true that contractual interest may be variously construed, viz.:—

1. as compensation to the creditor for the loan of money, or

2. as a substitute for the productivity of capital.

According to the former view, the domiciliary law of the creditor becomes more prominent, while according to the latter, that of the debtor (*i.e.* place of usufruct).

The various nations have set up maximum rates of interest, or at least limitations upon the rate which may be agreed upon. According to Savigny's formula the peremptory nature of these laws is relied upon for the application of the *lex fori*; but this cannot be taken as correct, and it has been repudiated by the French and Italian schools and by the law in England and the United States. If the *lex fori* would have to decide, the transaction would be partly altered in nature, and the advancing of loans to countries just being opened to civilization would be hampered.

The internal limitations upon interest refer properly to money loaned in the inland. There is no doubt but that the native state may declare contracts for the payment of usurious interest void, even though made abroad, so long as they are sued upon before the native courts; but we cannot consider this as a healthy legislative policy.

The principles of the *lex loci contractus*, or of the domiciliary law of the obligor, will frequently arrive at the same result in regard to interest, because it may occur that these systems of law happen to be the proper law of the contract in the particular case.

II. *Interest by operation of law.*

The rate of interest due by operation of law is governed by the law of the creditor, because here the interest represents an indemnity for the deprivation of the thing. If merchants agree, for instance, that payment should occur at some third place, it may be deduced from this agreement that the seller would have used the money just at that place and therefore the law of that place will govern.

2. In sales of immovables, the *lex rei sitæ* will govern in the absence of circumstances pointing to another system. The same applies to loans secured by mortgage. The place of the object is here the important element.

3. In open accounts of merchants, each party may demand the legal interest of his own country, except that, where the business is done through a bank, the law of the place in which the bank is located regulates the entire relationship.

4. Interest upon advances made in transacting business with a factor is governed by the law of the party advancing the money.

5. The duty of a guardian to pay interest is governed by the law under which the estate is administered. It is usually there that the money would have been employed for profit.

6. A mandatary can be obligated to pay interest for moneys illegally applied to his own advantage according to the law which interprets his conduct of the business for which he was employed. This will usually be the law of the place where the business was conducted, though under certain circumstances it may be the domiciliary law of the party having the right to the money, or if the mandatary ought to pay at a particular place, the rate of interest of this third place may be appealed to.

III. *Moratory interest, being a subclass of interest payable by operation of law, is subject, as a rule, to the principles laid down at II, 1, supra. It represents a kind of arbitrary valuation of the damage for the non-performance of a duty.*

IV. *So-called process interest is determined by the lex fori.*

Process interest is that which becomes payable, not because of any delay or contractual agreement, but because the suit had to be instituted. The institution of the action supplies the element of delay (*mora*). Interest here does not result directly out of the obligation.

V. *The German Imperial Statute of 1900 upon Consular Jurisdiction has provided for the possibility of increasing the rate of interest in districts where consular jurisdiction prevails.*

Section 33 reads as follows:—

“The rate of interest provided in §§ 246, 247, 288 of the Civil Code, and in § 352 of the Commercial Code, may be increased by imperial ordinance in any district or part thereof under consular jurisdiction.”

This provision is in consideration of the high risk taken in matters of loans in certain territories, and the doubtful protection afforded to property there.

In America and England

Contractual Interest.—The law of the place of performance is held to be generally applicable. In *Dickinson v. Edwards*, 77 N.Y. 573, Folger J. says, “This rule has been specially applied

to the rate of interest to be allowed; and it has been held that where a personal contract is expressly or by implication to be paid at a given place, and the rate is not fixed by the parties, interest is to be taken or reserved according to the law of the place where payment is to be made." It may be taken that this rule is merely a corollary of the broader principle that a contract is governed by its "proper law," or, in other words, "the law with a view to which it was made." In the case of loans this law will usually be that prevailing at the place where the loan is to be repaid. See also *Scudder v. Bank*, 91 U.S. 406; *Freese v. Brownell*, 35 N. J. L. 285; *Fergusson v. Tyffe*, 8 Cl. and F. (Eng.) 121, 140. *Contra*, *Bennett v. Association*, 177 Pa. St. 233. However, this will not exclude proof of the fact that the contract was made with a view to another system of law. In *Consequa v. Fanning*, 3 Johns. Ch. (N.Y.) 587, Chancellor Kent applied the Chinese law relating to interest in regard to a contract distinctively subject to that law.

Wharton (§ 508) holds that the place of performance of an obligation for the payment of money is the place of using the money, and with this our author seems to agree. The principle is partially sustained by a line of American cases which decide that where a loan is made, secured by mortgage, it will depend upon whether the money was to be employed on the land or whether it was loaned primarily on the debtor's personal credit. Thus, where an investment is made in a mortgage in Michigan, the note accompanying the mortgage being payable in New York, the law of Michigan was held authoritative upon the question whether the rate of interest was usurious (*Fetch v. Remer*, 1 Biss. 337; see also *Cope v. Alden*, 41 N.Y. 313; *Kennedy v. Knight*, 21 Wis. 340; *Pine v. Smith*, 11 Gray (Mass.) 38).

Usury laws are not generally considered to constitute rules of positive morality so as to warrant the interpretation that the legislature intended to make the *lex fori* applicable. See "The Enforcement of Usurious Foreign Contracts," *Albany Law Journal*, September 25, 1886.

Interest by Operation of Law.—Interest awarded by way of damages either *ex mora* or *ex delicto* is subject to the same rule (*Story*, § 307; *Slocum v. Pomeroy*, 6 Cranch 22; *In re South American Co.*, L. R. 7 Ch. D. 637). But as the place of payment usually coincides with the place where action is brought, the rule

is often stated in terms of *lex fori* (Carson *v.* Smith, 133 Mo. 606).

Processual Interest.—As stated by the author, where the interest partakes of the character of special damages imposed by the court of process, it will be subject to the *lex fori* (Lindsay *v.* Hill, 66 Me. 212; Lougee *v.* Washburn, 16 N.H. 154).

§ 109. Agency.

I. *Where an obligation has been concluded through an agent or representative, the law to which the agent is subject will, in general, control. It may be said that the question is to be judged just as though the principal had come to the place where the contract is concluded.*

The doctrine in France, England, and America also arrives at this result by the theory of *lex loci contractus*. The third party is considered, by way of a fiction, as having contracted with the representative.

II. *Exceptions to the rule.*

1. Where the mandatary or agent has contracted subject to ratification by the principal, the contract is considered to have been concluded by the latter and the agent to have merely prepared it.

2. In connection with the method in which insurance companies are to-day accustomed to make contracts, and business houses to take orders for sale through commercial travellers, it will be noted that the agent simply collects the orders or offers, and the real contract is made by the house. The agent is, in these cases, authorized to contract only according to the law of the principal. The practice of Swiss courts deduces from the rule compelling foreign insurance companies to acquire a special domicile in order to do business in Switzerland, the result that Swiss law is applicable to their contracts (*A. E.*, xv, p. 412). The soundness of this view is questionable.

III. *Where the possession of a thing is transferred through an agent, the general rule applies, i.e. the act is considered as occurring at the agent's place of business.*

Transportation companies and shipping agents can of course be the agent of either party. It will depend upon the will of the functionaries of these institutions in connection with the orders given them.

1. A shipping agent, ordered to receive goods on behalf of the purchaser, becomes his agent for that purpose (*A. E.* xiii, p. 75).

2. A company which pays the freight and duty upon a shipment from the time of shipment to the time of arrival at the point of destination is, in case of doubt, to be regarded as the agent of the consignee.

IV. *The conduct of an agent "de son tort" is subject to the law under which the act was done.*

The act of a "*falsus procurator*," or agent "*de son tort*," in presuming to act as a true agent is tortious, and he is answerable for indirect as well as direct damages (*contra* in law of bills, where only performance can be demanded; Swiss Code of Obligations, 821). A different result is reached, however, in jurisdictions where an agent is held to tacitly warrant his authority, *e.g. Germany* (Imp. Ct., vi, p. 216; xxxv, p. 145; Winscheid, "*Pand.*," i, § 74, note 7, a); *England and America* (Smith's "*Mercantile Law*," 9th ed., pp. 150, 160: "An agent impliedly warrants that he has authority"). *Contra, Switzerland* (*A. E.*, xxv, pt. 2, p. 856).

V. *A contract concluded by messenger has venue at the place from which he was sent, and not at the place where the messenger carries out his instructions.*

In this case it is not the messenger who has concluded the contract. He acts merely as the medium of communication.

In America and England

We are here not dealing with the contract of agency between the agent and principal which is governed by the "proper law" of that contract (*Maspons v. Mildred*, 1882, 9 Q. B. D. (C. A.) 530), but with the contract between the agent and the third party. The fiction mentioned by the author was stated tersely by Lord Lyndhurst as follows, "If my agent executes" a contract "in Scotland, it is the same as if I were myself on the spot and executed it in Scotland" (*Albion Insurance Co. v. Mills*, 3 W. and S. 223). In whatever country the authority of the agent is carried out, the principal is taken to have intended that it should be carried out with reference to the law of that country. The standard is therefore the *lex loci contractus* (*Chatenay v. Brazilian S. T. Co.*, 1891, 1 Q. B. (C. A.) 79; *Armstrong v. Stokes*, 1872, 7 Q. B. 598; *Hill v. Chase*, 143 Mass. 129; *Owings v. Hull*, 9 Pet. 607).

In support of the principle as stated at II, 1 and 2, *supra*, with reference to contracts concluded by commercial travellers, see *Hyde v. Goodnow*, 3 N.Y. 266; *Clafin v. Mayer*, 41 La. An. 1048. For examples of contracts concluded by insurance agents, see *Ruze v. Ins. Co.*, 23 N.Y. 521; *Quinn v. Ins. Co.*, 28 La. An. 105.

§ 110. Assignment of Obligations.

v. Bar, ii, p. 79.

I. *The assignment of an obligation is governed, so far as it affects the obligation itself, by the law to which the obligation is subject.*

Section 14 of the draft of the German Civil Code provided:—

“The assignment of a claim is judged by the same law as determines the claim itself.”

Although this article did not become part of the Introductory Act, it correctly states the practice of the German courts. See also Art. 12 of the Japanese law quoted at § 102, IV, 8, *supra*.

The assignment of an obligation has two phases from the legal point of view, viz.:—

1. It affects the obligation existing between the obligor and assignor. In this connection the same objective system of law is applicable which governs the obligation generally,—more often than not, the *lex domicilii* of the obligor.

2. An assignment is also an independent transaction between assignor and assignee, and, therefore, the law under jurisdiction of which it takes place will determine the effect of the transfer and the liability of the assignor. Thus, where a creditor in a foreign country transfers a claim against a domestic debtor, the law of the assignor will determine whether the assignment was in good faith, or only a simulated formality.

An assignment cannot alter the position of the debtor. A payment to the assignor will be considered valid if good by the law governing the obligation, even though not good by the foreign law governing the assignment (*A. E.* xviii, p. 521).

II. *Where a positive law provides that only so much may be demanded of the debtor as the assignee actually paid to the assignor in the purchase of the claim (e.g. French Code Civil, Art. 1699), the*

debtor may take advantage of it in case the obligation is distinctively subject to that system of law.

The local law governing the assignment cannot be applicable here, as otherwise the intention of the legislature might be thwarted. The object of the law is to protect the debtor, although his consent is not required for the validity of the assignment. Accordingly, the *lex domicilii* of the debtor at the time of entering into the obligation will govern.

It is true that Savigny (viii, p. 272), with his well-known formula, proposes to apply the *lex fori*. But this is incorrect; for if a claim arose in a country in which this *Lex Anastasiana* (so-called in the Roman law) did not exist, it would be unjust to permit the debtor to rely upon it, where it later became necessary to bring the action against him in a country in which it did exist.

III. *Assignments made to avoid the laws of a foreign country will be held ineffective also in the local state.*

Where a debt against a foreigner was assigned for the purpose of levying on assets of the debtor in order that the assignor might avoid receivership proceedings brought against himself in his own state, the Royal Imperial Supreme Court of Austria, in which country the assets were situated, held that the claim thus pretended to be assigned became subject to the receivership proceedings, as soon as they were pendent (Dec. of November 20, 1898; *Zeitschrift für internat. Privat- und Strafrecht*, ix, p. 490).

In America and England

The jurisprudence of the United States and England has in many cases regarded debts as following the law of the creditor under the well-known maxim of "*mobilis personam sequuntur*." See decisions in Story, § 397. In more modern times, however, English courts have adopted the custom of speaking of a place or *situs* of the obligation itself, in that the domicile of the debtor is looked upon as such *situs*. In *Kirtland v. Hotchkiss*, 100 U.S. 491, Judge Harlan says, "The debt in question, although a species of intangible property, may, for the purposes of taxation, if not for all purposes, be regarded as situated at the domicile of the creditor." And the American courts, more frequently than not, consider the *situs* of a debt, so far as concerns the creditor's *right* to it, as being at the creditor's domicile. Therefore an assignment good there

will be valid as against creditors of the assignor attaching at the domicile of the debtor (*Consolidated T. L. Co. v. Collier*, 148 Ill. 259; *Clark v. Peat Co.*, 35 Conn. 303; *Barth v. Backus*, 140 N.Y. 230). This rule is subject to two exceptions, viz. :—

1. that the assignment must not violate the statutory law or the known and settled public policy of the State of the debtor's domicile (*Bentley v. Whittemore*, 19 N.J. Eq. 462; *Barth v. Backus*, *supra*; *Warner v. Jaffray*, 96 N.Y. 248); and

2. where the debt is represented by a bill, or a bond, or security payable to bearer, there is a tendency to acknowledge that the debt has a *situs* apart from the domicile of its owner and therefore cannot be dealt with on the analogy of corporeal things (*Alcock v. Smith*, 1892, 1 Ch. (C. A.) 238; *Emerson v. Partridge*, 27 Vt. 8).

The English cases seem to be departing from the rule that the *situs* of a debt is located at the domicile of the creditor. See cases cited by Westlake, § 150, and *In re Queensland M. and A. Co.*, L. R. (1891) 1 Ch. 536, in which Judge North lays it down as follows: "A transfer of movable property duly carried out according to the law of the place where the property is situated is not rendered ineffectual by showing that such transfer, as carried out, is not in accordance with what would be required by law in the country where its owner is domiciled." The case was one of an assignment of ordinary *choses* in action. The same tendency is manifested in the later case of *Alcock v. Smith*, 1892, 1 Ch. (C. A.) 219, which was the case of an assignment of an overdue bill.

§ 111. Suretyship.

v. Bar, ii, pp. 109–110.

I. *Upon questions of suretyship, so far as concerns the nature and extent of the performance which the creditor has a right to demand, the same law which determines the obligation of the principal debtor also determines the obligation of the surety.*

In support of this proposition we may cite the theoretical rule of law, that the obligation of the principal debtor becomes that of the surety, and that no new obligation is undertaken by him (*Windscheid*, "*Pand.*," ii, § 476, *pro*; *Dernburg*, "*Pand.*," ii, § 77, *contra*, claiming this construction to be scholastic). The rule results also from the *accessory* nature of the obligation of the surety; the same

objective system of law must determine the obligations of debtor and surety, and the law of the principal debt must therefore be the standard.

II. *In other respects the contract of suretyship must be governed by the substantive law to which the surety is subject, i.e. as a rule, by the lex domicilii of the surety at the time of entering into the obligation.*

1. It is self-understood that the surety may expressly or impliedly subject himself to a different system of law, *e.g.* to that of the principal debtor. But sufficient elements must be present to show this intention; it will not be concluded merely from the fact that the surety has obligated himself for the performance of a contract in which a particular place of performance is expressly mentioned.

2. All questions relating to the surety's obligation, as such, are subject to the domiciliary law of the surety. These questions are the following (besides that of the surety's status):—

- (a) the validity and enforceability of the obligation,
- (b) the legal effect of the guaranty, especially whether the surety may plead the right of discussion or division,
- (c) the interpretation of the contract of suretyship,
- (d) the statute of limitations.

Von Bar says (ii, pp. 109–110) that the conditions under which the surety is bound or is freed, although the principal obligation continues, do not depend upon the law that rules it. It cannot be said that the economic purpose of having a definite system of law suffers because of subjecting the surety's obligation to a different system than the principal obligation. The rule laid down applies in the following cases:—

- (a) Ordinary suretyship.
- (b) Joint suretyship. In this case, each may be liable for the whole of the debt; but it does not follow that the surety is liable for the same amount as the principal debtor would be, as determined by his own system of law. Under certain circumstances, the surety will not be chargeable with knowledge of what this obligation is.
- (c) Suretyship combined with real security. The nature of the transaction does not change by reason of the existence of this further obligation.

- (d) Security in the form of a bank deposit made by a third person, for the proper performance of a contract. Security or deposits are demanded, for example, in the coal trade, by the German and Belgian syndicates.

Where, therefore, several persons domiciled in different countries, or in a country different from that which is the seat of the principal obligation, become sureties for another person, it does not follow that they are all subject to the law of the obligation for the performance of which they are sureties.

3. The rule as stated in regard to the right of discussion is supported by Story, § 332, *b*, and as to the whole theory by the Court of the German Empire (ix, pp. 185-188; xxxiv, p. 15); also by the Supreme Court of the Canton of Zurich (Ullmer, Suppl. No. 2692). Accordingly the *lex domicilii* of the surety will, as a rule, govern.

4. The maxim "*locus regit actum*" applies to the form of the obligation of suretyship. If the law under which the surety lives demands that the obligation be in writing, an obligation entered into orally will not suffice, though the law under which the principal obligation was created does not require it, unless, of course, the contract of suretyship was entered into at that place. A complication might arise where, for example, an inhabitant of Germany guarantees by telegraph the debt of a Swiss, as Arts. 126 and 127 of the German Civil Code, and Art. 12, Swiss Code of Obligations, are not in harmony, the former alone permitting a telegram to replace a written instrument. Both Germany (§ 766) and Switzerland (Art. 491, *O. R.*) require a contract of suretyship to be in writing. This provision is lacking in the laws of France (Civil Code, §§ 2011 *et seq.*) and Austria (Civil Code, § 883).

III. *There are certain exceptions to the rule laid down at II.*

1. Where one becomes surety for an officer of the state, that system of law is alone authoritative to which the officer was subject, because the guaranty prescribed by that law is the only one intended.

2. The same rule applies to obligations of suretyship required by the state in order to pursue a particular industry or occupation.

3. The same rule applies to security required from alien persons or corporations, especially foreign insurance companies, as a requisite for conducting business in the local state.

IV. *Security required to insure payment of the costs of an action, or damage caused by instituting it, is governed by the lex fori.*

V. *Suretyship in relation to the Law of Bills must be considered separately* (Art. 81, German Statute of Bills; Art. 808, Swiss O. R.). See § 189, *infra*.

In America and England

Contracts of suretyship are governed in regard to the conflict of laws by the principle generally applicable to contracts. As the surety undertakes to perform the contract of the principal debtor in case of his default, it will be usually "with a view to" the system of law governing the principal obligation that the surety contracts.

With regard to security for officials, the doctrine as stated by the author has been followed also in America. Story says (§ 290): "It has been decided that the bonds in such cases must be treated as made and delivered and to be performed by all the parties, at the seat of the government of the Union, upon the ground that the principal is bound to account there; and, therefore, by necessary implication, all the other parties look to that as the place of performance by the law of which they are to be governed" (citing *Cox v. U.S.*, 6 Pet. 172, 202).

The right of "discussion," which exists in jurisdictions of the Roman law, gives to the surety the right to demand that all remedies be exhausted against the debtor before recourse shall be had to him. The right of "division" is that of a cosurety to answer only for his proportionate share until all remedies have been exhausted against the other cosureties. As to these defences Story says (§ 322 *b*): "If the suit should be brought in a different country from that where the contract or obligation is made, the right of discussion or division would still belong to the surety as an incident to his contract, although it did not exist by the law of the place where the suit was brought (*lex fori*). The converse proposition would be equally true" (*Williams v. Wade*, 1 Met. (Mass.) 82; *Carroll v. Waters*, 9 Mart. (La.) 500).

§ 112. Performance of Obligations.

I. *The place, method, and conditions of performing an obligation may be expressly or impliedly fixed by contractual agreement.*

II. *A debt must be paid in the kind of money which is generally recognised in the state in which it is payable.*

This rule is, of course, to be taken in connection with the following considerations:—

1. Payment may be limited to a particular kind of money by contract. This occurs, for instance, where the parties use the term "in specie" or the like (see Swiss Code of Oblig., Art. 97). The German Civil Code provides as follows (§ 244):—

"Where a debt expressed in foreign currency is payable in the inland, payment may be made in the currency of the empire unless payment in the foreign currency has been specifically agreed upon."

2. A convention currency may be established by treaty. This has been done between France, Belgium, Greece, Italy, and Switzerland by the treaty of 1878, renewed in 1885. The treaty states agree to recognize the silver pieces of 5 frs. of each of the countries (Art. 3), and further that private individuals must accept the 2-fr., 1-fr., 50-ct., and 20-ct. silver pieces issued by any of the states to the amount of 50 frs. (Art. 5).

III. *The law of the place of payment also governs the duty of executing a receipt.*

This duty is dependent upon local legal conceptions. Inscription upon an invoice, "certificate of the post-office considered a receipt," must be regarded as an agreement to that effect.

IV. *The legal effect of a payment made by the debtor at the proper place is to be determined by the law to which the obligation is subject.*

It is according to this law that the competency of a plea of non-legal tender or *exceptio non numeratæ pecuniæ*, as against a receipt produced, is determined, although the following elements cause doubt upon the subject:—

1. It would seem to be influenced by the local conceptions at the place of payment.

2. It would seem to deal primarily with procedure; therefore the *lex fori*.

The latter cause for doubt, however, is unfounded, as here substantive law is merely clothed in the terms of a rule of procedure.

V. *The performance of an obligation may itself constitute a special legal transaction and, as such, be subject to another law.*

Thus, for instance, a bill may be given instead of cash payment. The local law to which the new transaction is subject will govern.

§ 113. Contracts concluded by Letter, Telegram, or Telephone.

v. Bar, ii, pp. 72-75.

Hindenburg, "*Les Contrats conclus par correspondance*," in *Revue de dr. i.*, xxix, pp. 263-285.

Meili, *Das Telephonrecht*. A comparative study (Leipzig, 1885).

Immediately following the widely quoted passage of Hugo Grotius upon the *subditus temporarius* ("*De jure belli ac pacis*," lib. ii, c. xi, 5, No. 3), this author says that contracts between persons at different places (*per litteras absentes*) should be governed by natural law. This solution is, however, rather obscure. Grotius evidently believed that these contracts, like contracts concluded on the open sea, lack a common jurisdiction or sovereignty to which they could be subject. But manifestly the parties are under some particular law, the question being only, which?

I. *Where the transaction has merely reached the stage of an offer made by a person by letter or telegram, the rights of each party are determined exclusively by the law to which he is subject, i.e. in the law of obligations, his domiciliary law.*

The separation of the legal positions of the two parties is necessary throughout. Until the minds of the parties have met, there exists really no bond of obligation. Nor can we create the fiction that one exists. It is therefore according to the law of each one of the parties that we determine if, and to what extent, he is obligated.

1. In the case of an offer made at a distance, the question to determine is whether the offeror remains bound according to the law to which he is subject. This he does under most modern systems until an answer could have been received from the offeree in the regular course of circumstances.

2. The offeree's rights and duties are governed by *his* own law, especially as to the means he must employ in communicating the answer, *e.g.* whether he must use the telegraph. This he must do where, from the nature of the business, the instructions of the offeror, or the import of the offer, it appears that haste is necessary. The telegraph is frequently the proper medium in mercantile transactions, though it is customary to complete telegraphic offers through letters containing the detailed conditions (*H. E.*, xviii, p. 141). The use of telegraphic codes permits of great parsimony in the use of words.

3. As to business conducted through the telephone, the proper

conception regards this as an oral communication between persons in each other's presence (§ 147, German Civil Code). I have already supported this view in my work, "*Telephonrecht*" (p. 199). The result of this fact is that the offeror becomes free immediately, if the offer be not accepted. In this regard, it becomes important who called up first; the law of the place of the person calling up first will be the standard.

II. *Assuming that the minds of the parties have met, the question then becomes: Which law is applicable to the contract?*

Views vary upon this point, the following having found support:—

1. That the contract is governed by the law prevailing where it is to be executed (Savigny).

2. That the *lex loci contractus* governs (Laurent and Weiss).

3. That the contract is subject to the law of the acceptor, because the offeror has, as it were, transferred himself to that place at the time of the offer.

4. That the contract is subject to the law of the party playing the preponderating rôle in connection with the contract, *i.e.* generally the law of the offeror (Surville, *Journal de dr. i.*, xviii, p. 361). This jurist states that the offeror impresses the seal of his national law upon his offer and in this way it reaches the offeree. If the latter make a counter-offer, he impresses the seal of *his* national law upon the same.

5. Neumann (*Internationales Privatrecht in Form eines Gesetzesentwurfes*, 1896, p. 86) proposes the following: That if the parties to a bilateral transaction be in different jurisdictions, the place in which the transaction was concluded will be that from which the offer went forth. Neumann believes that it is the offeror who moulds the intended transaction. This is probably so in the simple case in which the other says "I agree" ("*spondeo*"). But frequently this is not the case; the various rights and duties of the contract are discussed and thereupon alterations are made.

The question is properly this: At what place did the mutual declarations of intention necessary to the contract meet each other, that is to say, when and where was the contract perfected? Upon this point there are various theories (for which see Windscheid, "*Pand.*," ii, § 306). The answer to the question is dependent upon whether we support one or the other of the following:—

- (a) the theory of *declaration*, according to which the contract becomes perfect with the acceptance of the offer; if this theory is held correct, the law of the acceptor will govern;
- (b) the theory of *reception*, according to which the acceptance must at least have arrived at the place of the offeror; thus the law of the offeror will govern;
- (c) the theory of *knowledge*, according to which the parties must mutually have notice of the other's declaration of intention; here again the law of the offeror will govern.

A uniform solution of the questions arising here is therefore impossible, as it will depend upon which theory is supported by the courts or by legislation. France and Switzerland, for example, follow the reception theory in regard to the liability of the parties, and the theory of declaration in regard to the import of the contract (see Merlin, "*Repertoire de Jurisprudence*," 3d ed., Paris, 1887, *tit. vente* 1, Art. iii, No. xi). The contract becomes perfect when the acceptance arrives at the place of the offeror. In applying this provision to international matters, the law of the offeror will determine whether the parties are obligated. In these jurisdictions, however, the law of the place from which the acceptance was sent, determines the import of the contract, *e.g.* the liability in damages for the performance of the contract, the payment of interest.

Von Bar (ii, p. 72) expresses the view that each party can only hold the other to be bound in the sense in which the law of that other's domicile permits, and that the question of which local law is authoritative is not dependent upon where the contract was concluded in law. It is, however, in the highest degree unsatisfactory to dissect a homogeneous contract into two parts. Von Bar admits that where a final and complete offer is made on the one side and accepted on the other, the same result is reached by his view, as by that which makes the place where the contract is concluded the determinant, that place being held to be the one at which the offeror was first made aware of the acceptance of his offer.

In America and England

The view generally accepted in America and England is that a contract entered into by correspondence is perfected at the place *to* which the proposal is sent and *from* which the receiver forwards

his assenting reply (*Zeltner v. Irwin*, 25 N.Y. App. Div., 228; *Eliason v. Henshaw*, 4 Wheat. 225; *Clark v. Dales*, 20 Barb. 42; *Milliken v. Pratt*, 125 Mass. 374; *Adams v. Lindsell*, 1 Bar. and Ald. 681; *Dunlop v. Higgins*, 1 H. L. Cas. 381). Thus where a person receives an offer in one State with the privilege of letting it stand open for a day, and telegraphs the next day from another State accepting the offer, the contract is to be considered as made at the place from which the telegram was sent (*Perry v. M. H. Iron Co.*, 15 R.I. 380).

It is also generally held that the acceptance is complete from the *time* when the acceptor despatches his acceptance either by filing the telegram or by dropping the letter into the post (*Moon v. Pierson*, 6 Ia. 279; *Trevor v. Wood*, 36 N.Y. 307). As the acceptor's liability is determined from that place, he will be bound from that time on. The contract being complete, his acceptance is irrevocable, even though the offeror receives notice of the revocation of the acceptance before receiving the acceptance (*Vassar v. Camp*, 11 N.Y. 441; *Hamilton v. Ins. Co.*, 5 Pa. St. 339; *Dunlop v. Higgins*, *supra*; *Harris's Case*, L. R. 7 Ch. 587). This doctrine, long opposed in Massachusetts, has now been accepted even there, following the lead of Mr. Justice Holmes (*Brauer v. Shaw*, 1897, 168 Mass. 198).

A recent case follows the analogy of the mail and telegraph cases and applies the prevailing rule to those involving the use of the telephone. Under the constitution of California providing that a contractual action could be brought either where the contract was made or where it was to be performed, it was held that where an offer and acceptance were made by telephone, the contract was made in the county of the acceptor; but the agreement being performable in the county of the offeror, an action there was maintainable (*Bank of Yalo v. Sperry Flour Co.*, Cal. 1903, 74 Pac. 855).

PARTICULAR OBLIGATIONS

1. Under this heading we will not discuss *every* contract ordinarily falling within the law of obligations, but only those which are most important in international intercourse.

2. Reference is also to be made to mercantile contracts discussed under the heading of Commercial Law (§§ 160 *et seq.*, *infra*).

3. The principles of law here laid down as authoritative, apply generally, except upon the point of capacity to act, providing the parties have not agreed upon some other particular code or system of law within their privileges.

A. Unilateral Obligations

1. In general, unilateral obligations are subject, in their entirety, to the domiciliary law of the obligor at the time of entering into the obligation.

2. This proposition is also true in regard to obligations with possible mutuality (*e.g.* mandate, accommodation, *depositum*). Counter-claims, which form the substance of the *actio contraria*, are subject to the same rule; they are accessories of the principal obligation.

§ 114. Acts of Acknowledgment.

I. *Acts or contracts by which the authenticity of a transaction or legal relationship is acknowledged are governed by the domiciliary law of the party making the acknowledgment.*

1. Such an act may be performed in connection with transactions in any branch of private law. Its significance lies in the fact that the particular relationship to which it refers is thereby made secure as against the normal grounds of objection.

2. The recognition of an unlawful or immoral transaction does not prevent it from being void unless the act of recognition occurs under a system of law which considers the transaction preceding it as valid.

II. *The rule laid down above is subject to a number of modifications.*

1. An act of acknowledgment in connection with a suit at law will naturally be governed by the *lex fori*.

2. A contract by which a particular last will and testament (though it be an invalid one) is agreed to be recognized, is subject to the system of law authoritative upon succession.

3. The recognition of an illegitimate child is subject to the law authoritative upon relations of the family (for instance, under Art. 8, *N. & A.*, the *lex patriæ* would govern).

4. Where a real right is acknowledged, the *lex rei sitæ* will govern, unless there be some special ground for a different system of law.

§ 115. Obligation to pay a Debt of Honor.

I. *The law applicable to the original legal relationship will determine, in the first instance, whether a supplementary promise to pay a debt of honor be actionable, and the extent of the liability.*

Such obligations are frequently created through the liquidation of a business enterprise out of court. In these cases, the law governing the prior relationship of the parties will naturally be referred to, in the absence of grounds pointing to a different system.

II. *Where the obligation of honor arose after the completion of proceedings in bankruptcy, reference may be necessary to the law prevailing at the place where such proceedings were had.*

This will be true, however, only in cases where the nature of the obligation has been altered, or its existence destroyed by the law of the bankruptcy. Otherwise, Rule I will apply.

III. *Where the alleged liability has had the character of an obligation of honor from the beginning (which occurs frequently in transactions between friends and relatives), the domiciliary law of the obligor will govern in the absence of special circumstances.*

IV. Where a voluntary promise to pay was made by a German citizen to a creditor of the same nationality, from the former's place of business in an exotic country, the national (German) law was held to govern their relations. This the German Imperial Court (vol. xl, p. 197) deduced as being probably and reasonably the will of the parties. The court said that the parties could hardly have contemplated the application of foreign law where the creditor stood in no relation to the foreign country in question, and the debtor, only in so far as it was necessary to sojourn there temporarily, for the conduct of his business.

In general, supplementary promises, or promises to pay debts of honor, are actionable. The Romans ascribed invalidity only to such promises as, by their terms, lay within the arbitrary will of the debtor ("*si volam*"). Legal liability would now be recognized upon an agreement which submits the condition and measure of the obligation to the fair judgment of the debtor (German Civil Code, § 315).

[It is to be remembered that the plea of want of consideration is not recognized in countries of the Roman law as it is by the English common law. — *Trans.*]

§ 116. Mandate, or Power of Attorney.

v. Bar, ii, p. 108.

I. *The domiciliary law of the mandatary governs the obligation of the mandant within the scope of the authority granted; the former acts in place of the latter, and, therefore, the latter must submit to be judged in the same manner as the former himself.*

1. Of course the terms of the power must be observed, or else a mandatary in a foreign country could obligate the mandant without limit, where the law of that country gives him greater powers. Third persons must take notice of the terms of the power.

But the mandatary must be held harmless if he has properly executed his power; this result can, in many cases, be effected only by the mandant taking over from the mandatary the contracts as they have been concluded.

2. But where a mandatary is executing a mandate and the principal dies before the business is completed, the internal law of several countries will require him to complete it (Art. 2008, French *Code civ.*; Art. 404, Swiss Code of Obligations), though upon principle the power of attorney ceases with the death of the mandant.

This applies also in international matters, even though the law of the mandant provides otherwise, for it is only thus that *bona fides* is accomplished. To this effect is also Phillimore, iv, § 705.

3. Where, for example, a mandate referring to speculation in differences is given by a German to be executed in Paris, the French law will govern. Under § 1965 of the *Code civil* prohibiting such transactions, the mandatary would have no claim for indemnity, even though the law of the mandant does not contain such prohibition (see judgment of the German Imp. Ct., xii, § 8, p. 34).

4. Where a mandate embodies an act prohibited at the domicile of the mandatary, the mandate is invalid. There are states (*e.g.* Greece, Italy) which forbid the export of antique art treasures. If an Englishman were to order the shipment of such objects the mandate would be void, although such a prohibition be unknown at the domicile of the mandant. For the Italian law see Lepelletier, in *Journal de dr. i.*, xxiii, p. 962; for the Greek law see Reports of the International Criminal Union, ix, p. 316.

II. *A power of attorney to conduct an action at law is governed by the law of the country in which the action is brought.*

In America and England

We are here dealing with the relations between the principal and the agent. This relationship being based upon contract, it will be referable to the law with a view to which it was made, "which is in general the law of the country where the relation of principal and agent is created" (Dicey, p. 618). But it is not necessarily so. A difficult question is as to whether the principal's death revokes the authority of the agent. By the law of England and most of the States it does; by the law of Louisiana and France it does not, if the agent acted in good faith. Suppose the principal was domiciled in Louisiana and the agent in New York, what law shall govern? Story (§ 286, *d*) favors the law of the agent's domicile, while Phillimore favors that of the principal upon the ground of the "duty as well as the expediency of upholding, wherever it is possible, *bona fide* transactions with the subjects of foreign states." Story says, "The point has never, as far as my researches extend, been directly decided either at home or abroad;" and it still seems to be an open one (see Wharton, § 408).

§ 117. Loans.

v. Bar, ii, p. 109.

I. *The personal statute of the prospective creditor governs the preliminary contract to loan ("pactum de mutuo dando") provided there be no agreement to the contrary.*

It is the prospective creditor who, in the first instance, is the obligor. The rule as stated will apply also to the case of a loan to be secured by mortgage in another state.

II. *As to the loan considered as a contract in itself, the domiciliary law of the debtor at the time of the creation of the obligation governs the whole group of questions incidental thereto, such as the creation of the loan, recall, repayment, interest, costs, e.g. for drafting and satisfying mortgages or for transmission.*

I. Of course, each concrete case must be kept separately in mind, as there may be circumstances of fact constituting a basis for deducing an implied agreement of the parties for the application of a different system of law, such as the personal statute of either creditor or debtor.

It may also be possible that the parties have agreed upon a particular system of law in regard to one part of their relationship

(e.g. the domiciliary law of the debtor, upon the question of interest) while leaving the remaining questions to another system.

2. In the absence of any understanding, however, the domiciliary law of the debtor will be authoritative. It is clear that in the nature of the contract of loan, as in regard to all real contracts, there is necessary the delivery of a *res* (or a sum of money). This is considered as having occurred at the domicile of the debtor, although it may have taken place in fact at another place, such as the domicile of the creditor or of a third person. It is for this reason that the whole transaction is subject to the debtor's domiciliary law at the time of the creation of the debt.

Particularly is this true where the loan is secured by a mortgage at the debtor's domicile. If the mortgage be made at a third place, it does not follow that the *lex rei sitæ* will govern the loan, though, of course, the legal effect and import of the mortgage will be influenced by that system of law.

3. The creditor has a right to receive the same amount of capital as he advanced. It follows therefore:—

- (a) that where repayment occurs at the debtor's domicile, though the currency of that place be permissible, still the standard of value is determined by that existing at the domicile of the creditor (this becomes important in regard to such countries as Italy and South America where there is a variance in the value of paper and metal money) ;
- (b) that where repayment is made in a bill of exchange, rate differences must be added.

4. There are certain loans which will not be afforded protection even though sued upon in another state.

- (a) Loans made for an immoral or unlawful purpose are not actionable. Such, for instance, are loans for the maintenance of a brothel, or to be used in procuration.
- (b) The same is true as to loans to be employed in a trade forbidden by international law. A loan made for use in the slave trade is invalid, though the transaction be valid in the foreign country in which the money is to be employed. This is also the English view (Dicey, p. 542).
- (c) So also in regard to loans made in the furtherance of a game or wager, or in stock gambling, if the law under which the transaction takes place declares the loan unactionable. It must also be remembered that the *lex fori* can absolutely prohibit the action, though it would not regularly be applicable to the trans-

action. Loans and advances made knowingly for use in connection with a game or wager are unactionable according to Swiss law (Art. 512, Code of Obligations).

5. Where there is a limitation upon the capacity to borrow (such as exists in connection with the Roman institute of *Senatus Consultum Macedonianum*), the same rules govern as generally in relation to capacity to act; thus the territorial rule, Art. 10₃, Swiss Fed. Stat. Pers. Cap., and Art. 7₃, German Introd. Act, would here come into application.

In America and England

It is generally held that the currency in which a loan is payable is that of the place where the money called for is payable (*Rosetter v. Cahlmann*, 8 Exch. 361; *De Wolf v. Johnson*, 10 Wheat. 323; *Benness v. Clemens*, 58 Pa. 24). This is to be calculated by the real par, not by the nominal par, of exchange (Story, § 313). In other words, by bringing the action at another place than that at which the money would be payable by the contract, the obligor should not be compelled to pay the cost of remitting the amount to the foreign country where the debt was payable. Accord, *Scofield v. Day*, 20 Johns. (N.Y.) 102; *Adams v. Cordis*, 8 Pick. 280; *Cockerell v. Barber*, 1 Ves. (Eng.) 461; *contra*, *Lee v. Wilcocks*, 5 Serg. and R. (Pa.) 48.

Where the value of currency at the place of payment has depreciated, or the standard has changed, the obligee is entitled to an equivalent for that which he would have been entitled to, had no change taken place (*Bartsch v. Atwater*, 1 Conn. 409; *Descadillas v. Harris*, 8 Greenl. 298).

§ 118. International Obligations of Great Industrial Enterprises.

- E. J. Bekker, *Über die Couponsprozesse der österreichischen Eisenbahngesellschaften und über die internationalen Schuldverschreibungen* (1881).
- G. Hartmann, *Internationale Geldschulden. Beitrag zur Rechtslehre vom Gelde* (1882).
- v. Schey, *Die Obligationsverhältnisse des österreichischen Privatrechts*, i, pp. 115-128.
- Wendt, *Pandekten*, p. 466.
- C. v. Haerdtl, C. W. Tremel, and A. Weiss, *Prozess der Kaiser Franz Josef-Bahn über die Klage des Curators der Prioritätenbesitzer wegen Einlösung der Prioritätencoupons in Paris* (Vienna, 1878), pp. 463, 472, 473.
- J. Weil, *Die Geltendmachung der Coupons der Staatsbahnprioritäten im Auslande und das österreichische Curatorengesetz* (Vienna, 1893).

I. *To govern obligations arising out of such preliminary contracts as banks are accustomed to execute in floating the indebtedness of great international enterprises, such as the building of railroads, canals, electrical works, etc., it is clear that a uniform system of law must be the standard. It is therefore regularly deduced from the express or implied agreement of the parties, that the law of the central financial management shall control.*

This point may well be illustrated by the contract drawn between a syndicate of banks for the construction of the St. Gothard railroad. The syndicate consisted of the Bank of Darmstadt, Disconto-Gesellschaft of Berlin, Swiss Creditanstalt, Bleichröder of Berlin, Bishop of St. Albans in Paris, and M. Geiser & Co. of Turin. The contract was executed in Berne, and the banks interested assumed judicial domicile in that city. Renaud expressed the opinion ("*Rechtliche Gutachten*," edited by Hergenbahn, i, pp. 31 *et seq.*) that the *lex loci contractus* must govern, as the very nature of the legal relationship demands the application of a uniform law, and therefore excludes the possibility of applying the domiciliary laws of the various obligors (p. 45). This reasoning seems sound.

II. *The executed contract of loan is subject to the domiciliary law of the debtor, though not if any particular place of performance can be considered as having been agreed upon.*

1. A contractual agreement, to this effect may be deduced from the following:—

- (a) where payment of capital and interest is arranged for in different currency and different points are designated for the payment of the coupons and the principal;
- (b) where the executory contract of loan mentions various currencies (according to the coinage prevailing in one state or another).

Complications will arise where the relation between gold and silver varies and where a state changes from one standard to another, *e.g.* Germany and the United States, which changed from a mixed to the gold standard.

2. In the celebrated coupon litigation of the Austrian railways (German Sup. Ct. of Comm., xxiii, p. 205; xxv, p. 41; Imp. Ct., i, p. 23), the Supreme Court of Commerce decided that the seats of the obligations were not at Vienna where the obligations were entered into; that because of the certainty with which the various places of

payment were designated, *these* must be regarded as the places of performance. It is true, the Austrian courts said that it was unreasonable to suppose that the defendant company agreed to pay varying sums in repayment of one and the same loan, according to the places at which it was to be liquidated. But it might be said that the obligation was one in regard to which the creditor had the right to chose the currency in which it was to be paid.

In the underwriting of debts, we must always examine whether the parties have *intended* the application of foreign law. As a rule, this may be deduced from the fact that, with a view to attracting foreign capital, the business has been consummated in figures having reference to a particular foreign standard of currency.

§ 119. State Loans and other State Obligations.

v. Sicherer, *Das bayerisch-griechische Anlehen aus den Jahren 1835, 1836, 1837. Ein Rechtsgutachten* (Munich, 1880).

Meili, *Der Staatsbankrott und die moderne Rechtswissenschaft* (Berlin, 1895), pp. 1-18.

Pflug, *Staatsbankrott und internationales Recht* (1898).

Diena, *Il fallimento degli Stati e il diritto internazionale* (Turin, 1898).

N. E. Politis, *Les emprunts d'État en droit international* (Paris, 1894).

Kebedgy, in *Journal de dr. i.*, xxi, pp. 504-519; in *Revue générale de dr. international public*, i, pp. 261-271.

I. *Loans and obligations entered into by states are, of course, varied in their legal nature; on principle they are governed by the objective law of the debtor at the time of entering upon the obligation.*

1. The modern state employs its credit in the most varied ways, such as by the issue of:—

(a) Rents.

(b) Mortgage obligations.

(c) Funded obligations. Under this term we understand such debts for the liquidation of which certain receipts of the state are set aside. Where a number of such obligations are all placed upon an equal footing, we speak of the "consolidated" debt or "consols" ("*dette non exigible ou consolidée*"). To-day, all state debts created for a long term are spoken of as "funded."

In Germany, consols are understood to be such public obligations, the liquidation of which cannot be demanded by the creditor, but is in the will of the particular state alone. See § 2 of the Prussian Statute of December 19, 1869.

(d) Floating debt ("*dette exigible ou flottante*").

The public debt is to be treated juristically, not as a loan, but as a sale. The issue of the debt consists of a sale of bonds by the debtor, and the promises to pay contained therein are made to the creditor for such price as he pays to the state (Cosack, "*Lehrbuch des Handelsrecht*," 5th ed., § 66, p. 338). As a practical result, the individual creditor occupies the legal position of the bearer of a negotiable paper — *i.e.* the debtor is limited in regard to the defences which he may plead.

Some states issue loans with the obligation to secure them through their receipts from customs, *octroi*, tobacco, and the like. They also use terms to the effect that these receipts shall constitute a pledge for the proper payment of principal and interest. However, there is really no right of pledge here unless the forms of the authoritative system of law are observed, though a violation of the obligation would, of course, involve a breach of international public law.

It not infrequently occurs that one state assumes the debts of another, where it annexes the whole or a part of its territory. See upon this point Dudley Field, "Draft Outlines of an International Code," §§ 22-26. L. Levi in his "International Law with Materials for a Code of International Law" (1887), p. 84, also discusses the subject briefly. The division of the debt upon the separation of Belgium from the Netherlands is discussed by M. Milovanovitch, "*Les traités de garantie au XIXième siècle*" (Paris, 1888), p. 189. See also Bonfils, "*Manuel de dr. i. public*" (1894), Nos. 222-228. Even in ancient times questions arose as to how a public debt was to be treated where two states were moulded into one ("*Sym-politie*"), or where one state was broken up into two or more ("*Apopolitie*"). See Szanto, in *Zeitschrift für Wienerstudien*, vii, p. 249. Upon the modern phase of the question, reference may be made to Max Huber, "*Die Staatensuccession, völkerrechtliche und staatsrechtliche Praxis im XIX Jahrhundert*" (Leipzig, 1898).

Historically, it is to be noted that Hugo Grotius attempted to spell out a liability of individuals for the debts of the state. He lays down the following ("*De jure belli ac pacis*," liber iii, cap. ii, par. ii, No. 1):—

"*Hæc quamquam vera sunt, tamen jure gentium voluntario induci potuit, et inductum apparet, ut pro eo quod debet præstare civilis aliqua societas, aut ejus caput, sive per se primo, sive quod*

alieno debito jus non reddendo se quoque obstrinxerit, pro eo teneantur et obligata sint bona omnia corporalia et incorporalia eorum qui tali societati aut capiti subsunt. Expressit autem hoc quædam necessitas, quod alioqui magna daretur injuriis faciendis licentia, cum bona imperantium sæpe non tam facile possint in manus venire quam privatorum qui plures sunt. Est igitur hoc inter jura illa quæ Justinianus ait usu exigente et humanis necessitatibus a gentibus humanis constituta."

Grotius thus likens the relationship to suretyship, although the argument is not very clear. He points out that the surety becomes liable simply by his own consent ("*. . . cum fidejussores sine ulla causa ex solo consensu obligentur*"). Grotius lays great stress upon this analogy, as he returns to it again in another connection (*liber iii, cap. xiii, under i, No. 2*) where he says:—

"nam supra diximus, ex debito illo priore non res tantum debentis sed et subditorum ejus ex introducto jure gentium quasi fidejussione obligari."

Grotius's chain of thought is, if I judge aright, as follows: the member of a state is, by virtue of a *tacitus consensus*, to be taken as agreeing to its actions; he approves of them *in fact* and therefore appears as a kind of surety of the state. The reliance upon this construction is weak, for neither in internal civil law nor in international law can suretyship be predicated except upon the express intention of the party.

2. Though the state employ the money for fiscal, administrative, or other purposes, the obligation retains nevertheless its private legal character. Thöl ("*Handelsrecht*," i, 6th ed., § 215, p. 644) well says that the circumstance that the state is the debtor develops no legal peculiarity in the absence of a positive rule of law.

There are indeed some who say that the loan of money to a foreign state is in the nature of a gambling speculation; but this view is not sound. Phillimore says ("*Commentaries on International Law*," 3d ed., ii, p. 18):—

"The English courts have decided that bonds payable to bearer issued by the government of a state only create a debt in the nature of a debt of honor. . . ."

Gönnér ("*Staatsschulden*," p. 196) says that though state loans are within private law, yet public questions are also involved, and that every creditor of a state must take account of that fact.

Savigny ("*Obligationenrecht*," ii, 110) says, "Obligations of the state are not subject to the legal protection of a judge."

M. Milovanovitch ("*Les traités de garantie au XIXième siècle*," p. 394) says, "Sovereign states are amenable only to God and their sword; they are their own proper judges and alone decide to what extent their interests and their honor demand the execution of their obligations."

There are certain states which have special provisions upon the public debt in their Constitutions and extend to it a special protection. Thus, for example, the proposed French Constitution of 1848 (Art. 133) provided "*la constitution garantit la dette publique*." The Constitution of the Netherlands contains the following rule (Art. 176):—

"The obligations of the state toward its creditors are guaranteed. The debt shall be taken under consideration annually for protecting the interests of the creditors of the state."

The Constitution of Spain provides:—

"The public debt is hereby placed under the special protection of the nation."

The principle making the law of the debtor-state authoritative has also been established in France. The decision of the Civil Tribunal of the Seine in 1875 (reprinted in the *Journal de dr. i.*, iii, p. 271) contains the following:—

"1. It is a principle of law that every private individual who deals with a state submits himself by the sole fact of so doing, to the laws and jurisdiction of such state. 2. This principle is derived from the reciprocal independence of governments. They could not be subjected to the laws and jurisdiction of a foreign government against their will without imperilling the rights inherent in their sovereignty."

However, the acceptance of this principle should not give the state the right to subsequently abridge the legal rights of the creditor. The law existing at the time the transaction was consummated should continue to govern. Unfortunately this has not always been followed in practice.

II. *But states may also expressly or impliedly submit to the application of a different system of law.*

1. The correctness of this proposition has also been recog-

nized in France. Thus, in the decision above cited, we find the following:—

“It is indeed true that a state may also accept the system of law of its co-contractor, or the contract may provide that a particular system of law is thereby specially designated to govern the contract. If it thus submits itself to a special system of law, that law alone should govern and its execution in France may be demanded.”

2. A contractual submission to the law of another country is deducible in a case where principal and interest must, by the terms of the agreement, be repaid in a foreign currency, or where the interest alone is to be paid thus, especially if particular places of payment have been designated. A contractual designation of the place of performance can also be deduced from these circumstances.

III. *A peculiar situation is also created where the organs of a state issue bills payable at a particular place.*

The venue is held to designate a special forum, and, as the Swiss Federal Court has held (*A. E.*, v, p. 2), a submission to the legislation of the place of payment is also to be deduced therefrom.

IV. *The public debt of Egypt requires separate mention.*
Compare:—

W. Kaufmann, *Revue de dr. i.*, xxii, 556; xxiii, 48, 144, 266, 382.

Id., *Das internationale Recht der ägyptischen Staatschuld* (1891).

Id., *Die Kommissäre der ägyptischen Staatschuld und das internationale Recht* (1896).

F. Martens, in *Revue de dr. i.*, xiv, pp. 355, 388.

Politis, in *Revue générale de dr. i. public*, iii, pp. 245-253.

The law applicable internationally to the Egyptian state debt is to be found in the codes adopted by the Powers. The international courts (*tribunaux mixtes*) are in a position to force execution against a part of the assets of the Egyptian government.

V. *Legislative suggestions.*

It would seem both advisable and practical, in regard to loans made to foreign states in the future, or in conversions of debts already existing, to accomplish a formal agreement between the contracting parties which shall provide—

1. in how far the creditors shall have the right to examine into the administration of internal finance, to audit the tax receipts, and to suggest reforms in the administration;

2. that in case of dispute, or of an abridgment of the rights of the creditors, etc., an internationally constituted court shall have jurisdiction ;

3. the extent of the jurisdiction which the court shall have.

VI. *The question further arises whether productive establishments, such as railroads, canals, harbors, or steamship lines built with foreign capital, do not, under certain circumstances, become the property of the creditors.*

In my treatise, "*Der Staatsbankrott und die moderne Rechtswissenschaft*" (The Bankruptcy of States and Modern Jurisprudence), I set up the following propositions :—

1. The debts of a state represent obligations founded upon *private* law. The first principle of law is that obligations once entered into must be fulfilled. The internal *imperium* cannot arbitrarily vary them. It is entirely incorrect to speak technically of the *speculative* character of public debts.

2. As the ordinary legal remedies (execution and bankruptcy) are denied the creditor as against foreign states, the international commonwealth of law should arrive at a new medium by which rights against states may be accorded an independent and neutral protection.

3. To this end, a state which fails in the performance of its obligations or promises should be compelled to submit itself to the jurisdiction of a court composed of members of other nations, or to an international commission, which shall be empowered to take any or all of the following courses—according to the position of the state in question :—

- (a) to examine the entire economic condition of the state and from it to declare its duty to pay the debts incurred by it, within a certain time ;
- (b) to establish a supervision of the public finance by persons belonging to neutral nations ;
- (c) to abolish unfair regulations by which domestic creditors are preferred, or which are in contravention of obligations or guarantees specially entered into ;
- (d) to arrange for partial payments consistent with the domestic economy ;
- (e) to lay distraint upon certain lands or other assets of the state ;
- (f) to compel the state to issue certificates of payment realizable when the state shall have recovered from its depression.

§ 120. Gifts *inter vivos*.

v. Bar, ii, pp. 110-114.

Brocher, *Cours de droit international privé*, ii, p. 2.

Laurent, vi, p. 332.

Th. Missir, *Des donations entre vifs en droit internat. privé* (Paris, 1900).

Donations or gifts belong only in part to this division of the subject. The promise of donation and the obligation of the donee are all that will occupy us here. Property rights conferred by donation are within the Law of Things.

I. *Where the law creates limitations upon the status in respect of gifts, the rules laid down under the Law of Persons will apply.*

1. There are certain prohibitions founded upon the relationship existing between donor and donee; e.g. gifts between husband and wife (*donatio inter virum et uxorem*).

2. Limitations upon the power of donation are also laid upon the female sex in general. The personal statute at the time of the gift will govern.

3. The fact that a monk has taken the vow of poverty is not a basis for his incapacity to act in the matter of making gifts.

4. Whether or not juristic or artificial persons may make or receive gifts depends upon the law of their creation.

II. *The rule "locus regit actum" does not apply to the form of making gifts (or promises to give) if the authoritative personal statute provides some particular official formality.*

1. Thus § 518, German Civil Code, and § 776 of the Civil Code of Lower Canada require the verification of a judge or notary for the validation of promises to give. This requisite may be avoided by effectuating the gift.

2. The formalities necessary for conferring real rights (e.g. transfer of real estate) are, of course, determined by the *lex rei sitæ*. See *supra*, § 95.

III. *Substantive requisites (permissibility, validity, revocability) for effectuating gifts inter vivos are determined by the personal statute of the donor.*

This rule applies to:—

- (a) promises to give;
- (b) executed gifts ("gifts from hand to hand"). Such gifts do not form a part of the estate of the donor; he himself has separated them from it, and the donee has acquired title.

IV. *Where the personal statute of the donor permits the validity of a gift to be attacked, if in contravention of rights of succession, the law under which the estate of the donor is administered will be the measure of these rights.*

The following examples of such laws are of interest. The Civil Code of Austria provides (§ 951):—

“A person having descendants with peremptory rights to succeed to a quota of his estate cannot make a gift of more than half of his estate in derogation of the rights of such descendants.”

The Civil Code of France provides (§ 920):—

“Donations, either *inter vivos* or *mortis causa*, which exceed the portion of property which can be disposed of shall be reduced to that portion when the succession becomes open.”

Of course, where a gift has actually been consummated according to the law authoritative for it, and is, or has become, incontestable by lapse of time or other circumstance, it cannot become contestable anew by reasons of provisions in the law of succession administering the estate. The heirs can have no greater rights than their predecessor in law.

V. *Gifts causa mortis are subject to special rules.*

See § 140, *infra*.

B. Bilateral Obligations

§ 121. Contracts of Sale.

v. Bar, ii, p. 127.

Immovables

I. *Rights and duties of a personal nature arising out of contracts for the sale of land are determined by the system authoritative for other obligations. We have seen that on the Continent of Europe the lex loci contractus and the law of the place of performance are the standards most frequently adopted.*

1. It is necessary to distinguish the obligatory or *personal* side of the transaction from the *real* side. The former affords a remedy *in personam*; the latter gives title to the immovable (Fiore, “*Diritto internazionale privato*,” iii, p. 79).

2. It is important to determine whether the observance of the forms of a foreign country in executing the contract there, is

regarded as a fraud against the domestic law (*agere in fraudem legis domesticæ*). This is a matter which must be derived from the statutory and judicial practice in each country.

II. *The law of the place of performance is frequently stated as the theoretical rule by considering performance as occurring at the place where the immovable is situated.*

Regelsberger ("*Pandekten*," i, p. 173, § 44) favors this reasoning and holds that it is in no way arbitrary. He points out that the place of performance is thus determined by the nature of performance.

But this is not the practice adopted upon the Continent of Europe in *all* cases for the sale of immovable property. The *lex rei sitæ* governs only in case no express or implied agreement exists as to the application of the laws, and there are no elements pointing to another system otherwise authoritative for obligations. Regelsberger's theory fails in the exchange of real estate where the two pieces lie in different jurisdictions, for there would be two different places of performance (v. Bar, ii, p. 10, note 11). We may say as follows:—

- (a) where a state supports the theory that the personal obligations of buyer and seller may be kept separate, that theory will apply here also;
- (b) where a state supports the theory of *lex loci contractus* as to contracts in general, that theory will apply here also.

If we were to follow Regelsberger's view, we would have to refer to the *lex rei sitæ* also upon the question of the validity of the contract, *e.g.* whether it has become effectual as a written contract, though concluded by telegraph. The creation of *real* rights should assuredly be dependent upon the *lex rei sitæ*; so, too, the question who should pay the costs of transferring title (*droits d'enregistrement*). On the other hand, to refer all questions of a *personal* nature to it is too mechanical. Is it not unsound to refer to the *lex rei sitæ*, such questions as the rights of the parties upon an eviction by one holding paramount title; or upon a return of the property for cause; or as to reduction of the price for incomplete performance; or as to forfeiture in case of abandoning the contract; or as to the effect of excessive inequivalence (*læsio enormis*)? It is especially in connection with the consideration of concrete cases that Laurent too opposes the ap-

plication of the *lex rei sitæ* (viii, No. 145: "What has the lack of consent got to do with the situation of an immovable?").

III. *The lex rei sitæ must be observed where legislation at the situs has set up preliminary requisites for the validity of a sale of land between ancestor (parents, grandparents) and descendant (children, grandchildren), or between spouses.*

This rule (*e.g.* see French Civil Code, § 1595) has for its purpose the protection of the rights of the family. The observance of special regulations both in regard to form and substance is usually made obligatory.

IV. The *lex rei sitæ* also governs the sale of land belonging to a charity (*Stiftung*).

Movables

V. *Theory and practice have almost without exception declared the law of the place of performance to be applicable to sales of movables. The domicile of the vendor is generally to be considered as the place of performance.*

Savigny (*System*, viii, p. 225) pointed out that the true performance of the obligation is accomplished when the goods are shipped by the vendor and that the receipt is only the later result of an already completed performance. It is, therefore, the vendor's domicile or the location of his business which constitutes the place of performance.

The place of performance is distinct from the place of examination. It becomes important to determine the latter, in order to judge whether a claim for improper or defective delivery has been timely made. Especially in regard to sales made internationally to a distant point, the place of actual delivery to the consignee must be considered as the place of examination, for it is usually only when actual disposition over the goods is acquired that the vendee has the opportunity to discover their condition.

The principle stated at V is subject to the following exceptions:—

- (a) where the parties have expressed a clear intention otherwise;
- (b) where an agent or forwarder has been designated to receive the goods;
- (c) where it has been agreed that the vendee assumes all risk upon delivery of the goods to the carrier; the railroad or steamship company becomes the agent of the vendee;

- (d) where the goods are not to be received by the vendee or his agent, but are to be immediately delivered to a third party.

Particular Sales

Special rules are applicable to the following particular kinds of sales:—

1. Sales at fairs and at auctions (see § 122, *infra*).
2. Sales of negotiable instruments (see § 170, *infra*).
3. Sales of securities through banks or exchanges (see §§ 171–173, *infra*).

See also the discussion under International Commercial Law (§ 169, *infra*).

In America and England

Immovables.— We have already seen that the law of America and England differs from that of the Continent of Europe in referring to the *lex situs* wherever the determination of the question would influence title to land. This is so even though the question be intrinsically a personal one, such as the capacity of vendor or vendee (supplement to § 93, *supra*), or one of formal validity (supplement to § 55, *supra*). But if the sale of an immovable gives rise only to an action for damages, leaving the question of title untouched, the proper law of the contract, even though it be not the *lex situs*, will govern (*Minor*, “Conflict of Laws,” p. 31; *Glenn v. Thistle*, 23 Miss. 42; *Polson v. Stewart*, 167 Mass. 211).

Movables.— A sale of deliverable chattels is declared by the English Sales of Goods Act of 1894 (§ 18) to pass title when the contract is made, “and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.” Sales to a distance are therefore complete, just as on the Continent of Europe, at the place of shipment, and the law prevailing there will generally govern the validity of substantial provisions and of the formalities of the transfer (*Carthage v. Duvall*, 202 Ill. 234; *Marvin Safe Co. v. Norton*, 45 N. J. L. 412; *Merchants’ Bank v. Spalding*, 9 N.Y. 53).

A serious difference of opinion has arisen in America as to the *locus* of sales C.O.D. The question arises where a sale of articles made in one State, for shipment to another, is prohibited by the latter State, or conversely. A large number of jurisdictions hold

that the terms C.O.D. import only the reservation of a lien in the vendor, and that therefore the main rule applies (*Higgins v. Murray*, 73 N.Y. 252; *Com. v. Fleming*, 130 Pa. St. 138). Other jurisdictions imply an intention of the parties to make the payment a condition precedent to the vesting of title, and hence hold the law of the place of receiving and paying for the goods to be controlling (*State v. O'Neill*, 58 Vt. 140; *State v. A. E. Co.*, 118 Ia. 447). A review of the authorities is given by C. N. Gregory, in *Columbia Law Review*, December, 1904, p. 541. The question does not seem to have arisen in England.

§ 122. Transactions at Markets, Fairs, and Exchanges.

1. *The law prevailing at the place where a market or fair is held is applicable to all transactions undertaken there in the regular course of business. This rule applies also to the status.*

1. It is immaterial where the parties reside or where they are citizens. The great concentration of trade found at fairs and markets does not permit of the application of any other but the local law.

The rule applies also to the status for the reason that the manner of conducting business at such places accords no opportunity to examine into the status of the other contracting party. A person entering into a contract at such a place holds himself out as having capacity to act and cannot complain that his status is being judged from the territorial point of view. Especially can there be no doubt upon the question in countries such as Germany and Switzerland, where the territorial rules of Art. 7_b, German Introductory Act, and Art. 10_b, Swiss Fed. Stat. Pers. Cap., are in effect. It is precisely these transactions which represent the true and proper sphere for the application of territorial law.

The fact is also to be noted that a particular forum is frequently provided for suits arising out of transactions at markets and fairs (see § 30, Rules of Procedure, Ger. Emp.).

2. The substantive law applicable is that provided by the particular country upon the subject of markets and fairs. A special system of laws has been developed in many European countries applicable to the litigation of markets (*jus mundinarum*).

In early times, the cities created particular courts of fairs and markets and made them exclusively competent (see F. Dahn,

"*Handelsrechtliche Vorträge*," 1875, p. 185). In this way, the law of markets was applied to the exclusion of all other foreign law. "It would have been manifestly impossible to apply, by way of *professiones juris*, the national law of each guest of the fair (for instance, Arabic law), and all the complicated usages of the city of his origin." Von Bar (ii, p. 19) well says that no trade could go on at fairs, markets (or exchanges), if both parties were permitted to appeal to the law of their domiciles for regulating the ordinary contracts of these markets. Continuing he says: "Commerce demands that there shall be one law that shall necessarily determine the import of all contracts for all buyers and all sellers alike, and the possible and the only possible one in such cases is the law of the place where the contract was concluded."

The peculiar significance of the law of markets is recognized by Art. 2280 of the French *Code civil*, Art. 206, Swiss Code of Obligations, and Art. 84 of the German Statute of Bills.

3. No distinction is to be made between phases of the transaction before performance, and those occurring after it, as the law of the market or fair applies to *all* the questions incidental to the contract. Of course it is necessary that the transaction be actually conducted at the fair or market, whether by the party in person, or by his agent pursuant to his communicated instruction.

The law of the market or fair is applicable also in regard to questions of:—

- (a) the acquisition of title, and
- (b) the warranty.

4. The rule does not apply to a transaction only incidentally conducted at a market, and which is not of the nature of the business customarily concluded there (example, the sale of a villa).

II. *The main rule applies also to transactions concluded at public sales and auctions.*

1. At an auction, the conditions of the contract (*tabula auctionis*) are usually made known in advance, though it is not customary to fix the system of law intended to be authoritative.

2. The law under which the auction is being conducted will be applicable, for example, to the following:—

- (a) the binding of the bargain (offer, knock-down, release);
- (b) the extent of the warrant. This subject is often separately

regulated by statute. The Code of Private Law of the Canton of Zurich provides:—

“§ 468 (1478). At a judicial auction sale, no warranty is undertaken in the absence of special assurances, or fraud upon the bidder.

“§ 469 (1479). At a voluntary auction sale, the alienator warrants title like every other vendor, but does not warrant the goods unless guilty of fraud upon the buyer. The clause ‘as is’ is impliedly understood.”

3. The law of the auction applies also to the responsibility of appraisers.

4. The validity of a contract made at an auction, at which no bidding is expected (*pactum de non licitando*), is determined by the law of the place where the auction actually occurs, or where it was arranged to take place. Upon this question, see Regelsberger, *Civilrechtliche Erörterungen*, 1868, p. 189; Dec. of the Ger. Imp. Ct., xviii, p. 219; xx, p. 247; Dec. of Sw. Fed. Ct., *A. E.*, xx, p. 232.

III. *The main rule may be extended to transactions concluded at other places where trade is concentrated, such as at international expositions.*

§ 123. Contracts of Letting and Hiring.

I. *The letting and hiring of immovables is governed by the lex rei sitæ. Virtually the same result is obtained through the theory of the law of the place of performance.*

1. Such contracts are closely related to the permanent use of the land which is being let or hired, and often result in the lessee acquiring a permanent domicile upon the land itself.

2. The *lex situs* governs particularly the following questions:—

- (a) re- or sub-leasing,
- (b) abatements of rent (*remissio mercedis*),
- (c) notice to quit.

These elements are affected by local conditions.

3. In accordance with this view are also von Bar (ii, p. 108) and Story (§§ 270, 365). The latter bases his opinion essentially upon the interpretation of the conditions of the contract, being wholly local in character.

4. The *lex rei sitæ* is also authoritative to determine whether the contract of letting and hiring has granted a right *in rem*. If,

therefore, the obligation has been entered into under a system of law which permits real rights to flow from a personal contract, while the system of law prevailing at the *situs* of the thing does not, the obligation falls.

5. The *lex rei sitæ* applies also to private contracts of letting and hiring relating to hunting, fishing, water-power, and the like (see Swiss Code of Obligations, Art. 295).

II. *Contracts for the hiring of movables (including also the loan of stocks and bonds) are subject to the ordinary rules relating to obligations.*

The domiciliary law of the lessee is regularly authoritative.

NOTE

The question as to whether, and to what extent, a lease is valid, which has been made with a guardian, to extend beyond the term of the guardianship, is to be judged by the personal statute of the ward, *i.e.* the law under which the guardianship exists. See *supra*, § 82.

§ 124. Contracts for Work in the Manufacture of a Completed Article.

Various kinds of cases present themselves in practice under this heading. It will be necessary to separate discussion concerning such contracts as arise in everyday practice (*e.g.* piece-work), and contracts upon a large scale partaking of the same essential characteristics.

I. *Contracts in relation to large workshop enterprises (such as the building of machinery and apparatus) are regularly subjected to the system of law under which the work is being performed. This results from the fact that in such enterprises a uniform scheme is contemplated.*

A provision is often to be found, "the place of performance is X," X being the place where the article is manufactured. It does not follow from such a provision that the parties have mutually submitted their rights to an objective system of law. Thus in an action brought by a German machine factory against a brick manufacturer in the canton of Zurich, the Federal Court (*A. E.*, xxiv, pt. 2, p. 544) said:—

"The fact that the contract in question stated Magdeburg to be the place of performance does not prevent the application of Swiss law. For this provision is in contravention of the whole import of the

contract whereby the plaintiffs were obliged to deliver and mount the apparatus at Zurich, the domicile of the defendant. The place of performance for the plaintiffs was therefore not their own domicile (Magdeburg), but the domicile of the defendant in Switzerland."

II. *Contracts for work to be done upon the land of the obligee ("opus in solo factum"), e.g. building of a house, are subject to the lex rei sitæ, in the absence of elements pointing to another system.*

III. *The matter is otherwise in regard to contracts for the building of railroads, they being subject to the law authoritative for the enterprise as a whole.*

There is here no element of local individuality or relationship to the territory over which the railroad is to run. Furthermore, these contracts are usually awarded pursuant to a uniform scheme.

IV. *Where governments of states enter into contracts for the building of roads, canals, and the like, the application of the law prevailing at the seat of government will frequently be found the correct solution.*

1. This results from the fact that, as a rule, the organs of the state have power to contract only within the limitations of domestic legislation.

2. In the contract made between Messrs. Escher, Wyss & Co., of Zurich, and the government of his Highness, the Maharajah of Mysore (August 27, 1900), for the delivery, mounting, and maintenance of an hydraulic plant, in connection with the Cauveri project for transmitting power to the Colar gold fields, there was contained the following clause, under the title, "Law of the contract":—

"The contract shall become effective under British law as prevailing in India."

§ 125. Contracts for Work and Labor.

I. *The law of the master is authoritative.*

This applies to the following cases:—

1. Contracts with ordinary domestic servants of the household.

2. Contracts made with factory workmen. The basis of the contract is the initiation of the workman into a kind of factory organism. It follows naturally that the liability enacted by domestic factory legislation for accidents occurring in the conduct of the

factory will be applicable also in case of an accident occurring upon foreign territory in the course of work done at the request and cost of the domestic enterprise (*A. E.*, xviii, p. 357).

3. Contracts made by business houses with aliens abroad, for service to be performed in the internal state.

The same rule will apply even though the person be a travelling salesman for a domestic house in foreign territory. A contract was concluded in Paris between the dynamite factory "Nobel," situated in Switzerland, and an engineer, whereby the engineer undertook to enter the employ of the factory. The court applied Swiss law (*A. E.*, xv, p. 313), although the employee obligated himself to go to any factory upon the Continent of Europe, provided the company sent him there and paid his expenses.

The following case is essentially different. A Swiss house desired to engage a person to represent its German branch in Paris. The business was located in Württemberg, though the proprietor was domiciled in Switzerland. He contracts with a Frenchman residing in Paris to represent him there, the contract being concluded in Zurich. The court held (*A. E.*, xvii, p. 645) that the performance of the contract was not intended to be at the employer's domicile, but was connected with the seat of his business in Germany. It therefore concluded that the application of German law was intended by the parties.

A contract by which an employee undertakes not to compete with the factory in which he is employed is likewise subject to the law of the place where the establishment is located. Von Bar proposes to apply the *lex loci contractus* (ii, p. 21, note 37, a), and refers to a decision of the German Imperial Court (ii, February 11, 1887). In this case, however, the *lex loci contractus* and the seat of the factory were identical.

II. *Contracts with play-actors are subject to the law of the place at which the theatrical enterprise is to be conducted (i.e. where the theatre is located).*

1. The very nature of these contracts points to this solution. They belong to that class of contracts which have a uniform scheme in view, especially in regard to salaries and vacations. The rule laid down applies to such questions as these:—

- | | |
|---------------------------------|-------------------------------|
| (a) the import of the contract, | (c) notice of termination, |
| (b) its effects, | (d) unconscionable advantage. |

Whether the acceptance of an offer made at a distance has been timely or not, and as to whether there be a particular usage in such matters, are questions referable to the domiciliary law of the respective parties (§ 113, *supra*).

III. *Contracts of service made with circus proprietors are subject to the law of the circus.*

Contracts of service entered into with a circus or menagerie proprietor present difficulty for the reason that such enterprises move from place to place. It is also difficult to fix the domicile of persons connected with them.

In reality such contracts are governed by a constantly varying standard. The result is thoroughly in accordance with the peculiar nature of these "specialties of the law"; being in their nature unstable, stability can be accomplished only by agreeing upon a certain system of law.

IV. *Where an action for damages is brought by an employee of any of the classes here mentioned, against his employer, not for breach of contract, but in a tort (e.g. for issuing injurious circulars or publications), the lex delicti commissi will be authoritative.*

§ 126. Lottery Contracts.

v. Bar, ii, pp. 39-42.

Wharton, §§ 487-489.

I. *The validity and effect of a lottery contract are determined by the law of the place where the lottery is being conducted. There are some states, however, which have enacted absolute prohibitions against such contracts.*

1. Lottery contracts must be clearly distinguished from premium loans. The former are contracts creating the possibility of receiving a certain amount of money or property in return for the payment of another amount, the whole of which is risked (Bender, "*Die Lotterie*," p. 33). The latter ("*emprunt à prime*" or "*obligation à prime*") are aleatory loans, or loans with the possibility of receiving a greater sum in repayment than the amount of the loan (Thöl, "*Handelsrecht*," § 309).

2. Some countries refuse to recognize the validity of lottery contracts entered into with foreign lotteries, either because they are immoral or because injurious to domestic fiscal interests. Some countries recognize the validity of such contracts only in the event

that the lottery is conducted for charitable or communal purposes. There are also some countries which refuse recognition to any lottery contracts whatsoever, and which are so inimical to such transactions as to prohibit the sending of all matter relating thereto through the mails (United States; Switzerland to a limited degree).

3. Where the state itself conducts a lottery, it will be liable for its proper conduct. This follows in Austria from the provision of the Civil Code, § 1315 ("Likewise he who . . . has empowered an irresponsible person to conduct a transaction shall be liable for the damage caused to a third party thereby"). A state lottery is an economic enterprise. It is self-understood that even the citizen of a country which prohibits lotteries has the right to rely upon this liability before the courts existing at the seat of the lottery.

II. *Even in countries in which lotteries are prohibited, rights growing out of a mandate or partnership in connection with lottery transactions must be protected.*

The Swiss Federal Court has compelled payment by a collector to his principal, of a prize awarded upon a ticket in a foreign lottery which would have been forbidden to operate locally (*A. E.*, xxiii, p. 245). An action to compel the division of a prize awarded upon a ticket possessed jointly (*actio pro socio*) has also been held maintainable (*A. E.*, x, p. 563).

In America and England

Where lotteries are not illegal at the place where contracts in respect to them are to be performed, it has been held that such contracts may be enforced even in a State in which lotteries are prohibited (*McIntyre v. Parks*, 3 Met. 207; *Kentucky v. Bassford*, 6 Hill (N.Y.) 526; *semble*, *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. (C. A.) 589). Where it is shown that the plaintiff knew that the object of the specific contract was to violate the law of the State of performance, the contract will not be enforced (*Paine v. France*, 26 Md. 46).

It is submitted, however, that gambling in lotteries may be considered by the *lex fori* as absolutely against public policy, in which case the court will not enforce such a contract, no matter where it was made or where it was to be performed (*Roussillon v. Roussillon*, 14 Ch. D. 351, 369). Thus by statute in New York (Pen. Code, § 326) any person who in any way furnishes to another an

interest in a lottery to be drawn within or without the State is guilty of a misdemeanor. Under this law it was held (contrary to the Continental decisions cited by the author, *supra*) that a claim upon a partnership agreement for a share in the proceeds of a prize drawn in a foreign lottery would not be enforced in the local State (*Goodrich v. Houghton*, 134 N.Y. 115).

C. Obligations "*quasi ex contractu*"

§ 127. Obligations arising out of Voluntary Agency, Payment by Mistake, and Unjust Enrichment.

v. Bar, II, p. 114.

I. *Obligations of this nature are determined by the law prevailing at the place where the act which is the basis of the obligation occurs.*

1. Although most authors treat *quasi*-contracts in the same way as delicts, Laurent (viii, No. 3) does not recognize the *lex loci actus* as authoritative, and proposes, in Art. 17 of his Draft Code for Belgium, the standard of the personal statute of the parties, *i.e.* the *lex patriæ*, if the parties belong to the same nation, and the *lex loci*, only in case they do not. Laurent is influenced by the close relationship of *quasi*-contracts to contracts; he recognizes, of course, that the will of the parties is lacking, but he relies upon the fact that the law *presumes* it to exist. But the application of the *lex patriæ*, where both parties are of the same nationality, will not be found to be in harmony with justice in all cases. In some cases it *may* be found to be the correct solution, and in others not. If A and B know each other to be citizens of the same State X, and A pays B a sum of money by mistake while they are travelling together in State Y, it would not be equitable to test the obligation to repay, by the law of State Y, but rather by the *lex patriæ*. Laurent (viii, p. 11) would make the solution of his question depend upon whether there was *mala fides*, regarding the relationship, in that event, in the same light as a delict. Asser-Rivier (p. 86), on the other hand, holds the *lex loci actus* to be generally applicable to *quasi*-contracts, and that no submission to a different system of law can be implied.

2. The judicial practice of Switzerland follows the principle as stated at I. The court purports to base its judgment upon "the

almost unanimous opinion of authors" (*A.E.*, xii, p. 342; xxvi, pt. 2, p. 272).

3. The draft of the German Civil Code proposed to apply to *quasi-contracts* the law prevailing at the domicile of the alleged obligor at the time the act which forms the basis of the claim occurred—in the absence of a domicile, the sojourn to be controlling. An exception to the rule was proposed in the event that the claim arises out of a permanent relationship, such as community of property, administration of a guardianship, etc., in which case the law of the place at which the relationship existed was to be authoritative (Arts. 12 and 13). But these provisions were not adopted by the legislature into the Introductory Act.

II. *Where such obligations arise pursuant to law, on account of the obligor's ownership of a thing, especially of an immovable, the lex rei sitæ will govern.*

In America and England

See Supplement to § 128, *infra*.

D. Obligations "ex delicto"

§ 128. The Authoritative Principle Applicable to Torts.

P. Fiore, "*De la loi qui, d'après les principes du droit international, doit régir les engagements qui se forment sans convention,*" in *Journal de dr. i.*, xxvii, pp. 49, 717.

I. *The law generally prevailing upon the Continent of Europe makes the lex loci actus govern obligations in tort.*

The result of this rule is twofold, viz.:—

- (a) that a claim cannot be maintained unless it be actionable at the place where the act complained of occurred, although the *lex fori* would have considered it actionable;
- (b) that a claim can be maintained if it be recognizable by the *lex loci actus*, though not by the *lex fori*.

2. Obligations arising out of civil tort rest upon a violation of those rules of law which govern the conduct of each individual toward every other person, in his general intercourse with the world. It is obvious that the will of the parties cannot form a standard; neither can the *lex patriæ* or *lex domicilii*. It is

solely the law of the momentary sojourn which controls. Zitelmann (i, pp. 110-112) speaks here of the violation of territorial sovereignty.

Modern law, in contradistinction to the common (Roman) law, has gone farther, in that it affords a general "*actio culpæ*" instead of the "*actio legis Aquiliæ*" (Arts. 1382 and 1383, French *Code civil*; Arts. 1152 and 1153, Italian *Codice civ.*; Art. 50, Swiss Code of Obligations). A person guilty of a tort or *quasi*-tort must bear the consequences which the *lex loci actus* has fixed. This law applies even to the limitation of the action. The personal statute of the guilty party does not apply for the reason that the laws governing personal conduct toward others are intended to apply to everybody sojourning temporarily or permanently in a state. They have a certain relationship with the rules of criminal law, and therefore the local or internal law is peremptory.

This was the view of Bartolus (No. 47), and, in fact, the older writers were in unison in applying territorial law to this class of cases. Wächter and Savigny, however, destroyed the harmony among the authors and supported the *lex fori*, basing their rule upon the doctrine that the propositions of law which the judge is here compelled to apply are of a strongly ethical and coercive nature. But this theory is untenable. If we adopt it, a claim could be held actionable upon the strength of the *lex fori*, though no tort had been committed at the place where the act occurred. Suppose a person's reputation were wrongfully injured by a newspaper article in a foreign state and the editor responsible were cited in the local state. If the wrong were done under a system of law following the *lex Aquilia*, there would be no chance of success; but if brought in the local state, where, we will suppose, the *lex Aquilia* be not supported, the theory of Wächter and Savigny would result in a recovery. The other consequence would be that, though an act be tortious at the place where it was committed, it would have no remedy if the *lex fori* did not so recognize it.

How correct it is to lay down, not the *lex fori*, but the *lex loci actus*, as theoretically authoritative, will be seen from a special case in the class of actions which, in the Roman law, are known as *de pauperie*. According to the law of Massachusetts, the owner of a dog is liable for double the amount of damage caused by it (Wharton, § 478). If, then, the dog bites or injures persons in

another state, the owner could not be mulcted in these extraordinary damages, even though the action were brought in Massachusetts.

European theory and judicature are now again uniformly of the view that torts and *quasi*-torts are determinable by the *lex loci actus* (*lex delicti commissi*). There is often a special forum prescribed for such actions. The law of the place of commission is also authoritative upon whether such claims may be assigned and upon what grounds the cause of action abates.

(a) The German Imperial Court has frequently stated that the legal results of a tort are governed by the law of the place where it is committed (Civ. Cases, vii, p. 378 ; xxxvi, p. 28).

(b) The decisions of Swiss courts are also in favor of the view (*H. E.*, xi, p. 197). The court in this case says :—

“With the exception of the criminal punishment to be given in case of unlawful acts, *public* interests are no more affected by the legal relationship of the guilty to the injured party than they are in determining the legal results of a breach of contract. . . . The more recent doctrine has definitely given up Savigny's view, and has declared in favor of the application of the law of the seat of the act, in regard to the results of a tort in civil law.”

3. The Belgian Draft Code proposes the following rule in Art. 8 :—

“*Quasi*-contracts, civil torts, and *quasi*-torts are governed by the law of the place where the act, which is the basis of the obligation, occurred.”

II. *There are countries which have modified the principle as stated.*

1. The rule set up in England and America is that a claim in tort can be asserted only when recognized both by the *lex loci actus* and the *lex fori* (see Wharton, § 478, and Westlake, in *Journal de dr. i.*, ix, p. 10). Wharton says, “The prevalent rule is, that to sustain an action for a tort committed abroad, *the lex fori and the lex loci delicti must concur* in holding that the act complained of is the subject of legal redress.”

Dicey lays down the following rules (Rules 174–176) :—

“Rule 174. — Whether an act done in a foreign country is or is not a tort (*i.e.* a wrong for which an action can be brought in England) depends upon the combined effect of the law of the country

where the act is done (*lex loci delicti commissi*) and of the law of England (*lex fori*).

"Rule 175.—An act done in a foreign country is a tort if it is *both* :—

1. wrongful according to the law of the country where it was done,
and
2. wrongful according to English law, *i.e.* is an act which, if done in England, would be a tort.

"Rule 176.—An act done in a foreign country is not a tort if it is not *both* :—

1. wrongful according to the law of the country where it was done,
and
2. wrongful according to English law.

"Sub-rule.—An act done in a foreign country which, though wrongful under the law of that country at the moment when it was done, has since that time been the subject of an act of indemnity passed by the legislation of such country, is not a tort."

With this compare also Dicey, at pp. 660–666, and the comments of Moore at pp. 667–670.

2. Art. 12 of the German Introductory Act provides :—

"No broader claims are maintainable against a German for a tort committed in a foreign territory than are created according to German laws."

Von Bar (ii, p. 122) also develops the view that the personal statute of the defendant shall prevail in so far as to determine the limits to which the obligation may go. I do not consider this conception theoretically correct, and at most the only barrier one can set up is that the native judge shall not impose, or permit to be imposed, any punitive damages for a tort committed abroad, simply because the foreign state permits it. This was proposed in the second German Draft Code (§ 12), but was not adopted, being replaced by Art 12, Introductory Act, above quoted. Thus the application of the foreign law of torts is still more restricted, the determination of the nature and extent of the recovery being reserved to German law. The foreign law definitely decides, however, whether the act complained of is or is not tortious. Neumann states the very contrary in his edition of the Civil Code (iii, p. 1355), saying that the limitation in Art. 12 refers *particularly* to the question whether grounds exist for an action for damages. My view

follows that of Endemann (i, p. 99, note 19). Von Bar's limitation on the *lex loci actus* does not seem sound (ii, p. 122). He would permit the judge to give weight to the *lex fori* in certain cases where it would be unreasonable to hold the defendant liable, citing the extended application made of Art. 1384, *Code civil*, in France.

3. The Japanese statute of 1898 (*Ho-rei*), upon the application of the laws in general, contains the following provisions (Art. 11):—

“The existence and effect of obligations arising from unauthorized agency, unjust enrichment, or tort are determined according to the law of the place where the facts composing the basis of such obligation occur.

“The foregoing provision, so far as it concerns torts, does not apply to facts occurring in a foreign country, but which do not constitute a tort according to Japanese law.

“Furthermore, facts occurring in a foreign country and which constitute a tort according to Japanese law cannot be the basis of any greater recovery than is afforded by the laws of Japan.”

III. *The question whether a third party not directly responsible for the tort shall be liable in damages, follows the main rule, and is determined by the lex loci actus.*

1. Modern legislation has, in a great many instances, imposed liability upon persons socially stronger than those immediately responsible for the tort (French *Code civ.*, Art. 1384; Swiss Code of Oblig., Art. 62). For this reason the question is of great practical importance. Third parties cannot be held liable where the place of performing the act does not so consider them, even though they would be held so by the law of their domicile. “In order that the law of the place where an act was done or omitted to be done shall decide whether an obligation or liability in damages shall arise, it is necessary that the same law be held to determine whether a person other than the party immediately guilty shall be liable” (Imp. Ct. of Germany, Civ. Cases, xxxvii, p. 181).

The rule applies with special force where the civil liability of the third party is predicated upon his own accessory guilt.

2. So-called police laws, such as forestry, hunting and fishing laws, and laws to aid in preventing violations of customs regulations, also provide for a liability on the part of third persons not directly responsible. Aliens are equally subject to these provi-

sions. The basis of this liability is to be found in a certain personal relationship between the immediate author of the tort and the party to be held liable.

The legal construction of the liability is not altogether plain. In Prussia a "presumption of complicity" has been spoken of, as, for instance, where a person allows wood or other products of the forest to be purloined. Another view is to hold the party to a guaranty that the misdeed shall not be performed, imposing a penalty in case the misdeed occur. See Reuss, *Die Haftung Dritter nach bayerischen, preussischen, und Reichsstrafgesetzen* (Würzburg, 1900), pp. 76 *et seq.*

In America and England

It is well settled that common law torts, and probably statutory torts not in derogation of any settled rule of the common law, may be redressed as well in the courts of a State in which the wrong was not committed as in that of the *lex loci actus* (*Le Forest v. Tolman*, 117 Mass. 109; *Needham v. Grand Tr. R. Co.*, 38 Vt. 294; *Knight v. W. J. R.R. Co.*, 108 Pa. St. 250; *Phillips v. Eyre*, L. R. 4 Q. B. 225, 239; L. R. 6 Q. B. 1). It has been held in England, however, that no action for an injury done to foreign land will be maintainable in the local courts. This would seem in harmony with the principle laid down by the author with regard to *quasi-contracts* (§ 127, III, *supra*), as in both cases it is impossible to separate an action for wrong done or benefit received in connection with a piece of land, from the question of title (*British S. Africa Co. v. Co. de Mocambique*, 1893, A. C. 602).

It is generally stated, especially by English authors, that in order that an action for tort be maintainable, the *lex fori* and the *lex delicti commissi* "must be in accord" in recognizing the act sued upon as wrongful and actionable. This became converted in America into a doctrine that only *common law* torts will be actionable outside of the State in which they are committed, and that the courts will not recognize rights of action in tort growing out of foreign statutory law (*Richardson v. N. Y. C. R. Co.*, 98 Mass. 85; *Buckles v. Ellers*, 72 Ind. 221; *Woodward v. M. S. R. Co.*, 10 Ohio St. 121). In the Ohio and Massachusetts cases cited, the action was brought for the death of the plaintiff's intestate, the plaintiff being authorized to bring the suit only by the law of the forum.

This objection was finally disregarded by *Leonard v. Columbia S. N. Co.*, 84 N.Y. 48, and the decision was approved later by the Supreme Court of the United States, where it was said that "when- ever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced, and the right of action pursued in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties" (*Miller J. in Dennick v. Central R. Co.*, 103 U.S. 11). The court entirely disregarded the distinction between common law and statutory torts, and its decision may be based upon the same principle which, as we have seen, prevails upon the Continent, that a right of action for a tort given by the law of the foreign state will be redressed in the local. See, in harmony with this doctrine, *Usher v. R.R. Co.*, 126 Pa. St. 207; *Herrick v. R.R. Co.*, 31 Minn. 11; *Laird v. R.R.*, 62 N.H. 254; *Burns v. R.R. Co.*, 113 Ind. 169. The principle has been sanctioned by a recent federal decision, which decided, however, that the local court was not in position to accord the *remedy* of the foreign statute (damages in the form of a pension), and hence dismissed the action (*Slater v. Mexican N.R. Co.*, 1904, 194 U.S. 120).

The English rule is opposed to what thus seems to be the tendency now prevailing in the American cases, and holds that unless the injury is wrongful and actionable, both by the foreign law and the law of England, no action can be maintained (*The Halley*, L. R. 2 P. C. 193; *Rex v. Topham*, 4 T. R. 126; *Reg. v. Labouchere*, 12 Q. B. D. 320). There are also some American cases which incline to the earlier view (*Ash v. R.R.*, 17 Md. 144; *R.R. v. McCormick*, 71 Tex. 660; *Oates v. R.R.*, 104 Mo. 514).

How immaterial it is that the law of the forum should be like that of the foreign state is shown by the fact that the *negative* phase of the rule is everywhere recognized; that is to say, that unless the act is considered wrongful and actionable in the country where it was performed, no action may be maintained in the local state, even though a remedy would have been afforded had the act occurred there (*Whitford v. Panama R. Co.*, 23 N.Y. 465; *Carpenter v. R.R.*, 72 Me. 388; *Le Forest v. Tolman*, 117 Mass. 109, which was the case of the dog cited by the author *supra*; *Phillips v. Eyre* L. R. 4 Q. B. 225, L. R. 6 Q. B. 1, 29; *Dobree v. Napier*, 2 Bing. N. Cas. 781).

Of course, if the act is considered wrongful only by virtue of a foreign penal statute, no remedy will be accorded in the local state (*Bettys v. R.R.*, 37 Wis. 323; *Bank v. Price*, 33 Md. 487; *The Halley*, cited *supra*).

NOTE

The *capacity* to be guilty of a tort is properly referable to the same system of law as regulates the status. As a rule, however, we find the territorial view applied, a standard which the courts deduce from such statutes as the following:—

- (a) Art. 3, French *Code civil*: "*Les lois de police et de sureté obligent tous ceux qui habitent le territoire.*"
- (b) Art. 11, Italian *Disposizioni*: "*Le leggi penali e di polizia e sicurezza pubblica obbligano tutti coloro che si trovano nel territorio del regno.*"

§ 129. Special Cases of Torts.

v. Bar, ii, p. 120.

I. *If the physical act or manifestation of the will on the one hand, and its result on the other, occur at different places, the question arises here, just as it does in criminal law, as to what law shall govern.*

Von Bar holds that the place of the physical act itself must be authoritative because—

- 1. otherwise the greatest uncertainty would follow, as the results of an act are manifested, so to say, everywhere and nowhere;
- 2. if we accept the place of the result as the standard, the rule of *lex loci actus* would be thwarted and a wholly different law become applicable, having little or no connection with the act itself.

It is indeed difficult to set up a formula suitable for every case, though perhaps the following will be acceptable: A tort is to be regarded as having occurred in the jurisdiction in which the act either immediately or eventually producing the damage can be considered as having been completed, in so far as any further effect is merely its necessary consequence.

II. *Consideration of some special classes of torts.*

1. In actions for unwarranted arrest or for the misuse of other process, the law of the place where the writ was exercised will govern. To this effect are the decisions of the German Imperial Court (vii, No. 116, p. 380) and the Zurich Court of Appeal (*H. E.*, xi, p. 197).

2. Civil liability arising from a press libel is determined by the law of the place where the publication appeared. Italian courts

have expressed themselves to this effect (*Journal de dr. i.*, x, p. 747). In regard to such torts, the trespass externally tangible (the communication) lies in the publication and dissemination of the libel, and therefore the place of publication is authoritative. The place of the act is not the place of printing, but that of publishing the libel, *i.e.* the place from which it was handed out to the public (*H. E.*, vi, p. 206). The domicile of the defendant is therefore not the standard (*A. E.*, ii, p. 38).

3. A slander is completed at the moment when the slanderous words are uttered. Here the place of the tortious act is clear.

4. A libel is completed only when communicated to another person. Thus a libel contained in a *closed* letter is regularly to be considered as having occurred at the place at which the letter is delivered to the addressee. It is otherwise in the case of open letters or post cards. In the case of closed letters, the intention of the writer is that the contents of the letter shall be communicated to the addressee only at the place of his domicile or sojourn, and this will usually be the result; in the case of injurious postals, the intention is that they should be read by the persons engaged in forwarding them, and that the libel shall be read not merely by the addressee, but, in advance, also by third parties. This may result even at the place of mailing (*H. E.*, vi, p. 204).

III. References.

Upon obligations in tort toward the mother of an illegitimate child see § 89, *supra*.

Upon the right of damages for tortious acts within the law of commerce see § 180, *infra*.

Upon collisions occurring on the seas (*abordage maritime*) see § 204, *infra*.

§ 130. Liability of States and Communities for Injuries occurring to Foreigners within their Borders.

v. Eck, *Vergoeding van oproerschade* (1888).

H. A. van Karnebeck, *De Costa Rica Packet Arbitrage* (1900).

"Incident italo-américain de la Nouvelle-Orléans, 1891," in *Journal de dr. i.*, xviii, pp. 1147-1161.

"Responsabilité des États à raison des dommages soufferts par étrangers en cas d'émeute ou de guerre civile." Report and project of the Institute of International Law in *Annuaire*, xvii (1898), pp. 96 et seq.

v. Bar, "De la responsabilité des États à raison des dommages soufferts par des étrangers en cas de trouble, d'émeute ou de guerre civile," in *Revue de dr. i.*, xxxi, p. 464.

I. *The question has arisen whether the state is obliged to pay the damage caused to foreigners in the event of domestic revolt or civil war. Modern international law answers the question in the affirmative.*

The question is an important one, for uprisings and similar phenomena are frequently the cause of injury to aliens.

It might be claimed that the effects of a mob or revolt are the results of uncontrollable force (*vis major*), and that therefore the state need not pay the damage. This is the view supported by B. Calvo. Others justify the liability by simply saying that a right of private law has been invaded. A third view regards the question as one of public law. This also results in according a right of damages against the state.

Recent authorities upon International Public Law work out the liability from the duty which every state has in maintaining order and the security of property, and in protecting all persons within its territories against force and interference. Brusa has worked out the direct responsibility of the state in an able article entitled, "*Responsabilité des États à raison des dommages soufferts par des étrangers en cas d'émeute ou de guerre civile*" (*Annuaire de l'Institut de droit international*, 1898, xvii, p. 96). From this article I cite the following passage:—

"Let us remember that the duty of reparation does not depend upon a fault committed, and, as we shall see, not even upon a denial of justice or a violation of international law. It is derived directly from the exercise of the public power of the state. The sovereignty of the state is not a mystical principle, but a human and social one. In order to fulfil its high mission of protector and guarantor of the peace and of justice within its territory, the state has not such absolute power that it is capable, on the one hand, of disposing of the property of others, yet on the other, to escape the liability which everybody has, of paying reasonable compensation according to the rules of natural reason."

Based upon a whole group of legal deductions, Brusa proposes the following resolutions:—

1. Indemnity for damages suffered through a civil war, insurrection, mob, or uprising against foreigners, is founded upon a right. It is not a mere act of assistance accorded by a spirit of humanitarianism.

2. The indemnity is due by reason of the obligation which the state is under, to compensate for the profits and advantage which it has derived from the goods and persons of foreigners.

In its main features, I hold this development of the subject to be correct. I would emphasize that the right to damages is in no wise a claim for aliment, nor for a petty contribution. The *legal* grounds are sufficient to support a claim for full satisfaction.

There are a number of treaties which provide that the citizens of each of the contracting states shall enjoy *complete* protection in regard to their *person* and *property* within the territory of the other.

II. *The liability has been recognized in modern international practice.*

Based upon the same legal theories as are here supported, the kingdom of Italy has frequently demanded and received from other states direct damages for injuries sustained by its subjects. I have in mind, *e.g.*, the affair at New Orleans of the year 1891 (see *Journal de dr. i.*, xviii, p. 1147). The government of the canton of Zurich also paid a not inconsiderable sum in damages to the Italian subjects who had suffered from the uprisings of the 28th and 29th of July, 1896.

III. *The liability of the state is a direct one, and not merely of a subsidiary nature. The legal basis is neither that of civil suretyship nor of representation.*

Heffter, in his article entitled "*Die Nithinderung von Verbrechen gegen Personen und Eigentum*," etc. (*Archiv des Krim. R.*, N. F., 1851, p. 445), supports the view of a direct liability as follows:—

"Neither does the state become liable as a guarantor or surety for the acts or omissions of its servants, but because it has not properly fulfilled its obligations to the individual through the organs provided for that purpose. This is a wholly independent cause of action, and is itself tenable for the same reason that an action against an *exercitor*, *caupo*, *stabularius*, etc., *ex malificio* for injurious acts of his servants. Doubtless the action could also be brought against the guilty servant, but neither action *need* be brought first, although the completion of the one would preclude further action against the other."

At the end of the article, it appears that Heffter's views have been adopted by the legal faculty of the University of Berlin.

IV. *The Institute of International Law has adopted conclusions to the same effect (Annuaire, 1900, xviii, p. 254).*

In addition, it also adopted the following resolution (*Annuaire*, xviii, 1900, p. 256):—

“Recourse to international commissions of inquiry and to international tribunals is recommended generally for the settlement of all differences which arise on account of damage suffered by foreigners in the course of a mob, insurrection, or civil war.”

The wishes of the Institute are further expressed as follows (p. 253):—

“That the states should refrain from inserting clauses in treaties providing for mutual irresponsibility in the case of damage so suffered. The Institute holds that these clauses tend to absolve states from performing their duty of protection over their subjects abroad and of foreigners in their own territory. It holds that states which, on account of extraordinary circumstances, become unable to afford sufficient protection to foreigners, can exempt themselves from the consequences of such a condition of affairs only by temporarily refusing foreigners access to the territory.”

LAW OF SUCCESSION

§ 131. Introductory Remarks.

I. Reference should again be made to § 7 *supra* for the various principles supported by the laws of the different countries in determining the private relationships of aliens in the local state and of natives abroad. These principles apply in matters of succession.

We will frequently find that in the administration of the estates of deceased persons, more than one system of law is applicable to the same succession. Thus, for example :—

- (a) to certain preliminary questions of family law (*e.g.* legitimacy), the *lex patriæ* ;
- (b) to rights of succession, domiciliary law.

There may also be a severing of jurisdictions. A preliminary question of personal law may be referred to the courts of the national state, while in all other matters the domiciliary state will assume jurisdiction. But even excluding questions of status, all questions connected with a succession need not be governed by one system of law. It is possible :—

- (a) that a certain system be applicable to intestate succession ;
- (b) that another determine the validity of a contract for succession ;
- (c) that another be authoritative as to the rights of the surviving husband or wife.

In some countries it may occur that only *part* of an estate is subjected to its law of succession. We have here in mind countries which apply the *lex rei sitæ* to land, even where it constitutes part of an estate in succession, *e.g.* Austria, Holland, Russia, England, United States.

II. It is a rule of the law of succession that the testator or intestate may not designate the objective system of law which shall be applicable to the administration of his estate. The only exception is presented by Swiss law, which, within certain bounds, permits a testator to elect the authoritative system of law (see § 134, *infra*).

Wherever treaties expressly assume to regulate the law of succession between nations, the application of any different system is excluded, as is also the severance of principal from preliminary questions.

III. Besides the rules of conflict existing in the particular countries of the world, reference is to be made also to the following :—

1. The treaties (see § 153 *et seq.*, *infra*).
2. The treaty proposed at The Hague (see § 159, *infra*).
3. The proposed treaty of Lima (Meili, *Kodif.*, p. 94).
4. The proposed treaty of Montevideo (*id.*, p. 115 ; Reports of the International American Conference, p. 891).
5. Unofficial projects, of which the following are of importance :—
 - (a) Mommsen's project. In § 15 this jurist proposes the application of the *lex patriæ* to the law of succession.
 - (b) Laurent's project, Art. 12, provides :—

" Les rapports de famille et les droits qui en résultent sont régis par la loi du pays auquel les personnes appartiennent.

" Les successions déférées par la loi ou par la volonté de l'homme dépendent du statut personnel du défunt."

The Belgian revisory committee proposes the following in § 6 of its draft :—

" Les successions sont réglées d'après la loi nationale du défunt.

" La substance et les effets des donations et des testaments sont régis par la loi nationale du disposant.

" L'application de la loi nationale du défunt ou du disposant a lieu, quels que soient la nature des biens et le pays où ils se trouvent."

IV. Where a system of law applicable on principle to a matter of succession contains the institute of civil death, or punishes religious heresy with exclusion from succession, the domestic state within which the estate is to be administered will not recognize or execute such rules if foreign to the spirit of its own law.

V. In respect of the rights of succession of persons who have disappeared from society, and the administration of their estates, see § 69, *supra*.

VI. Wherever the domicile is the standard in the law of succession, the *conception* of domicile is of special importance, particularly the difference between domicile in private law and domicile for the purposes of taxation ; the two do not necessarily coincide (see § 43, *supra*).

VII. The theoretical principle that reference and re-reference are not permissible in solving conflicts of law applies also to the law of succession. It is improper, therefore, to say that the law of succession of a foreign state (*e.g.* the *lex patriæ*) is applicable, *including its own rules of conflict*. The courts are frequently misguided in this regard. Thus the decision of the Supreme Court of Appeal at Lübeck (Seuffert, *Archiv*, xiv, No. 107) is incorrect, as von Bar (i, p. 280, note 45) well points out. Of course the legislature *can* expressly provide for reference, but its intention to do so must plainly appear.

VIII. International Public Law has provided exceptions to the main rules. The estates of diplomatic representatives are subject to the home laws, even though the state of their mission supports the domiciliary theory. Diplomatic representatives maintain their home domicile through the so-called doctrine of extra-territoriality.

IX. The law applicable to the administration of the estate is to be distinguished from that under which the probate or "opening" of the estate is to occur. The latter usually occurs at the last domicile of the deceased, but this does not designate the substantive law to be applicable. Probate looks toward the protection of the estate, and therefore the natural control goes to the laws of the place at which the deceased was domiciled at the time of his death. The question of what jurisdiction shall be *otherwise* controlling requires further examination. Of course, if the estate lies in whole or in part in the state to which the heirs belong (or in which the legal representative, *e.g.* executor, resides), it would be useless to transfer the assets to the place of probate, only to remove them back again for the purpose of distribution amongst the heirs and next of kin.

§ 132. The Doctrines adopted by the Various Countries in Regard to Succession.

Basileso, *Études de droit international privé. Du conflit des lois en matière de succession ab intestat* (Paris, 1884).

H. Coulon, *Principes généraux sur la dévolution héréditaire au point de vue international* (1890).

J. Champcommunal, *Étude sur la succession ab intestat en droit international privé* (Paris, 1892).

I. *Modern law has developed both the domiciliary and the national theory in regard to the law of succession. A uniform*

disposition is difficult for the reason that the Roman idea of succession as a unit does not prevail in all countries.

1. Even at the time when International Private Law first made its appearance as a science, the question arose as to which system of law should control in distributing the estate of a deceased person whose property is situated in various countries. Albericus de Rosate († 1354) discusses the topic in a manner really quite modern, although the law of origin signified something different at that time from what it now does. Rosate sets up the following question (No. 136) in *liber II de statutis*: —

"Bona habens in diversis civitatibus et moritur, an de bonis suis debeat decerni secundum statuta civitatis, unde est originarius, an civitatum, in quibus bona et patrimonia sunt sita."

This "pretty" question ("*pulchra quæstio*") he answers as follows: —

"Quidam dicunt, quod debent servari statuta civitatum, in quibus habet patrimonia."

"Alii dicunt spectari locum originis. Et haec videtur tutior, quia in multis praevalet ratio originis."

"Alii tamen dicunt, quod spectetur locus, in quo testator moritur. Quod sic probatur, sicut heredes instituti capiunt expressa voluntate testatoris, sic venientes ab intestato ex tacita."

"Verius credo, quod locus originis attendatur et non locus mortis, nam locus mortis demum inspicitur, cum locus originis est incertus."

2. Certain predecessors of Bartolus referred the rules of intestate succession to the following systems: —

(a) the law of the place of opening the succession (*aditio hereditatis*);

(b) the law of the place of decease, on the ground that intestate succession results from a kind of implied will of the intestate.

Bartolus opposed these two conceptions and proposed to set up the "*verba statuti vel consuetudinis*" as the standard; it was this part of his doctrinary discussion that caused so great a sensation.

3. According to the old statutory theory, inheritance, *i.e.* the acquisition of things through succession, was determined by the *lex rei sitæ* in regard to immovables. On the other hand, the well-known maxim "*mobilia ossibus inhaerent*" was established for movables in order to prevent a legal dispersion of the estate. The older authors, indeed, will be found using the statement that the

rules of succession constituted real statutes; but this is not to be taken literally, because the fiction obtained, that at least movables were situated at the domicile of the testator or intestate. This construction did result, however, in causing the foreign property of a native to be treated as an independent *patrimonium*.

4. The Roman legal theory of universal succession or succession as a unit, by means of which the legal personality of the deceased passed over to his heir, was referred to in Germany as early as the time of Mevius ("*Decisiones*," i, *pars v*, *Dec.* 164). The Germanic conception, however, referred to the individuality of the various kinds of property composing the estate; real estate occupied a distinct position.

"Hereditas universitas quædam juris est; et quo jure illa censeatur, ex eo, quidquid ejus est, capitur. Inde non jus loci, ubi sunt bona hereditaria sed ubi relinquitur hereditas, circa jus successionis consideramus. Quod fieri intelligitur, non ubi defunctus est, cui succeditur, sed ubi domicilium habet. Cui, quamdiu aliud non apparet, creditur destinasse et adjecisse bona sua tamquam accessorium rei principali."

5. Succession to immovables is determined by the *lex rei sitæ* in the following countries:—

- (a) France (Art. 3, *Code civil*); also the derivative laws of Belgium, Mexico (Art. 13), the Special Statute of the Netherlands (Art. 7), Argentine (Art. 10), and Spain (Art. 11).
- (b) Austria (Unger, i, 201). See Imperial Patent of August 9, 1854 (§ 23), upon judicial procedure.
- (c) Russia (Martens-Léo, "*Droit international*," ii, p. 455).
- (d) England, Westlake (*Journal de dr. i.*, viii, p. 318).
- (e) America.

Dicey lays down the following rule (No. 180, p. 682):—

"The succession of the movables of an intestate is governed by the law of his domicile at the time of his death, without any reference to the law of the country where:—

"1. he was born, or

"2. he died, or

"3. he had his domicile of origin, or

"4. the movables are in fact situate at the time of his death."

Wharton (§ 560) says that in matters of succession in England and America, "realty is governed by the *lex rei sitæ*," and adds

(§ 561), "With this recognition of the absolute control of the *lex rei sitæ* over immovables is coupled, in England and the United States, an equally emphatic recognition of the law of the last domicile as governing succession as to movables."

II. *The lex domicilii of the deceased is taken as the standard for succession in a number of states.*

With the reservation above made in regard to immovables, the *lex domicilii* is supported by the following countries:—

1. England and America, *i.e.* in regard to personal estate.
2. Russia (Martens-Léo, "*Traité de dr. i.*," ii, p. 455).
3. Austria (Imp. Pat., 1854).
4. Argentine (Art. 3283).
5. Switzerland (Art. 22, *N. & A.*). This is, of course, assuming that no election of his national law has been made by the testator; also exclusive of Art. 28, *N. & A.*, whereby the national law is applied to Swiss subjects domiciled abroad, if the foreign law is not applicable by its own terms.

III. *The lex patriæ of the deceased is taken as the standard of succession in a number of states.*

In this category belong the following:—

1. Italy (*Disposizioni*, Art 8). See *Journal de dr. i.*, ii, p. 48. No distinction is made between aliens in the inland and natives abroad; also none between movables and immovables.
2. France, except in regard to immovables. Succession to movables was formerly determined by the domicile. This was deduced from Art. 110, *Code Civil* ("*le lieu où la succession s'ouvrira sera déterminé par le domicile*"). But the authorities now hold to the *lex patriæ* (see *Journal*, xii, pp. 1-16; xiv, p. 479).
3. Germany (Arts. 24 and 25, Introductory Act), with the modification contained in Art. 27 (see § 7, *supra*).

The law which governs the succession also governs the capacity to succeed, the validity and effect of a will, contracts for succession, renunciations, and peremptory rights of succession (*Noterbrecht*). An exception is made in the case of an alien who has become a German citizen since the execution of the will. The jurisdiction of the courts is regulated by § 73, Statute on Voluntary Jurisdiction.

§ 133. A Neutral Doctrine in the Law of Succession.

I. *It is wholly incorrect to hold that matters of succession can and must be referred exclusively to one doctrine, especially to that*

of *lex patriæ*, as is so frequently maintained upon the Continent of Europe.

1. Martens-Léo, in his "*Traité de droit international*" (ii, p. 454), referring to the law applicable to succession, says, "This law ought to be that of the country to which the deceased belonged, because succession is a matter concerning rights of the family and therefore should be governed by the law which governs such rights."

2. A. Rolin ("*Principes du droit international privé*," i, p. 722, No. 478) is also of this opinion: "From the point of view of correct principle and for future legislation, we believe that it would be infinitely preferable that succession should be governed in general by the national law of the deceased. There exists a manifest current in this direction. . . . The opinion of juriconsults becomes more and more pronounced in its favor."

3. The Institute of International Law adopted the following conclusion at its Oxford meeting (*Annuaire*, v, p. 57):—

"vii. Succession to an inheritance considered as a unity, so far as concerns the determination of the persons entitled to inherit, the tenor of their rights, the extent or quota of the portion with which the testator may freely deal, or of the reserve, and the material validity of testamentary dispositions, shall be governed by the laws of the state to which the deceased belonged, or subsidiarily, in the cases provided by Art. vi, by the laws of his domicile, no matter what be the nature or situation of the property."

Art. vi, referred to in this passage, provides:—

"Whenever a person has no known nationality, his status and capacity to act shall be governed by the laws of his domicile.

"In case different civil laws coexist within the same state, questions relative to the status and capacity to act of the alien shall be determined according to the internal law of the state to which he belongs."

We consider it unsound to apply the lex patriæ in so unlimited a manner to all questions of the law of succession. The proposed treaty of the Third International Conference also went too far in the direction of the *lex patriæ*, although making certain modest concessions to the law of the domicile. See § 159, *infra*.

II. *The statutes of certain states have tempered the application of personal law in matters of succession.*

1. The *German* Introductory Act provides that succession to the estate of a German citizen, even though dying abroad, is governed by German law (Art. 24), and an alien domiciled in Germany, by his foreign law (Art. 25). But Art. 27 of this Act makes the peculiar doctrine with which we have become familiar under the head of capacity to act, capacity to marry, and divorce, applicable also to matters of succession. The *lex patriæ* is recognized as authoritative in the first instance, but if the particular *lex patriæ* itself refers to German law, that law shall govern. See § 7, III, 2, and § 58, III, 1, *supra*.

It follows, therefore, that the estate of a citizen of a country supporting the doctrine of domiciliary law in regard to succession, as, for example, England, America, or Switzerland, will be administered according to German law, if the deceased was domiciled in Germany at the time of his death. Conversely, the estate of a German citizen domiciled in such a state will be subjected to the domiciliary law by the doctrine supported *there*. Art. 27 of the Introductory Act does not refer to the converse case, and therefore a German court would apply the main principle of *lex patriæ*. This is a case of absolute conflict. It would, of course, be solved in favor of the law of the country whose courts actually obtain jurisdiction of the parties and of the property.

German law regards the estate as a unity, and therefore, in the absence of a treaty provision, the same system of law is applicable to movables as to immovables. The treaty of 1874 with Russia refers succession of immovables to the *lex rei sitæ*.

2. The law of Switzerland also represents a middle doctrine. Although the *lex domicilii* is applicable both internationally and intercantonally, a testator has the right to choose the law of his origin or the *lex patriæ*. See § 134, *infra*.

§ 134. *Professio juris* in the Law of Succession.

I. *By analogy to the intercantonal provision, aliens domiciled in Switzerland are permitted to subject the succession to their estates to their national law.*

1. Art. 22 of Federal Statute, *N. & A.*, provides :—

“Succession to estates of the dead is governed by the law of the last domicile of the deceased.

"Nevertheless a person may subject the succession to his estate to the law of his canton of origin by testamentary disposition or contract for succession."

This provision is, as we have seen (§ 7, III, 4, *supra*), made applicable by analogy to aliens domiciled in Switzerland. Swiss subjects domiciled abroad are, even without this provision, subject to the law of their canton of origin, provided the foreign law does not make itself applicable by its own terms, it being remembered that succession to immovables located in Switzerland is always subject to that law (Art. 28, No. 1, *N. & A.*). If the foreign law (and forum) is thus made applicable, the Swiss subject cannot change the situation by an act of his own will, as no other country recognizes such a system.

2. As a result of choosing the *lex patriæ* in the manner permitted by Swiss law, it becomes exclusively applicable to the following questions:—

- (a) the right of succession;
- (b) the restraints upon the testator, including the rights of peremptory succession;
- (c) the contest of the will for material invalidity;
- (d) the rights and powers of the executors.

But the rights thus accorded should not be permitted to affect the rights of third persons, or the means of securing them; neither does it refer to provisions essentially processual in their nature. If this view be correct, the national law will not apply to the following:—

- (a) the means of taking up succession;
- (b) the inventory;
- (c) the obligations of the heirs for the debts of the testator.

II. *The choice of law permitted by Art. 22 is bound up with certain formalities. It must occur either by testamentary disposition or in a contract for succession.*

1. The testator can choose only the law of his origin. He cannot choose partly that law and partly that of his domicile.

2. He must manifest his intention clearly and unmistakably (*A. E.*, xxv, part 1, p. 55).

3. Where the law applicable to succession is regulated by treaty, Art. 22 will not apply, unless the treaty itself adopts this

theory. No treaty has done so as yet. See, for example, the treaty with the United States (§ 157, II, *infra*).

4. A statement contained in a will to the effect that the testator considers his place of origin as his domicile will not suffice as an explicit choice of his national law. The question as to where a person is domiciled cannot be determined by act of the party. In a doubtful case, however, such a statement might be given consideration to prove intention.

5. The mere fact that an alien, after taking domicile in Switzerland, allows a will executed in his country of origin to remain unchanged will not suffice as a choice of his national law under Art. 22 (*Revue de dr. i.*, xiv, No. 36).

6. A difficult question is this: whether the *professio juris*, Art. 22, is subject to the rule of "*locus regit actum*" in the permissive sense of Art. 24, by which the form of a testamentary disposition may conform either to the law of the place of execution, the domiciliary law at the time of execution or of the death of the testator, or the national law. This I would answer in the negative. The choice of law thus accorded is an idea so new that it would seem that the legislature intended that the law of the Swiss domicile should be alone authoritative as to form. There can be no real analogy to foreign law, because no other system contains this form of *professio juris*. Thus a German, domiciled in Zurich, who by his native law is permitted to retain possession of his will, without depositing it officially, cannot take advantage of Art. 22 without fulfilling the requirements of the domiciliary law, which requires that it be deposited.

7. Art. 22 does not affect the obligation to pay taxes. The statute refers only to "civil relationships."

III. *The legislative policy of Art. 22 of the Federal Statute is to be commended.*

This provision of Swiss law is extraordinarily interesting. It represents a policy that could be used to good advantage in regulating cosmic intercourse generally. Even those who would not be inclined to favor the adoption of domiciliary law generally, as applied to succession, will see the advantage of tempering the prevailing principle of *lex patrie* by permitting the testator to choose the law of his domicile. This is the converse of the Swiss rule. There are a mass of persons in modern times living as aliens

in their state of domicile and having a most intimate connection with it. 'Why should they not be permitted to make this law govern the succession to their estates? There is an obvious need for such a privilege. Thus a case has occurred in which a Frenchman, legally domiciled in Austria, provided by will that, contrary to the Franco-Austrian treaty, his estate should be administered as that of an Austrian by the Austrian courts and according to Austrian law (*Zeitschrift für internat. Privat- und Strafrecht*, ix, pp. 107-109, 302-304).

§ 135. Capacity to act, in Respect of Succession.

I. *The capacity to act in matters of succession depends, in the first instance, on personal law.*

1. There are, however, certain modifications :—

- (a) Germany. Although Art. 7 of the Introductory Act makes the *lex patriæ* the standard, the exceptions or limitation contained in subdivision 3 of this article (see § 58, III, 1, *supra*) do not apply to "matters within the law of succession."
- (b) Switzerland. Art. 10, Fed. Stat. Pers. Cap., does not apply to questions of status within the law of succession. By Art. 34, *N. & A.*, the *lex patriæ* is applicable, where the status of an alien living in Switzerland is involved.

2. The following are questions of capacity to act :—

- (a) Whether a person, by reason of a general disability, may or may not receive or decline an inheritance ; whether he may make any binding declaration at all with reference to his successory right to an inheritance. As we have heretofore seen, the personal statute governs in regard to the capacity of minors and married women. An heir's capacity to act may also have been limited by reason of a penal sentence.
- (b) Whether a person, by reason of a general disability, may or may not enter into contracts affecting succession (contracts for succession, contracts for the sale of an inheritance).
- (c) Who shall act on behalf of a bankrupt in case he shall have become entitled to an inheritance ; whether an administrator in bankruptcy has the right to contest a will in case it exclude the bankrupt from participation.
- (d) Who shall act for a person under interdict (*e.g.* an insane person).

3. With these questions of capacity to act, we must not confuse the substantive *right* of succession, although it is often briefly

expressed in the term "capacity to succeed" (*Erbfähigkeit*; see § 136, *infra*).

II. *Testamentary capacity is subject to rules separate from those applicable to capacity to act in general* (see § 144, *infra*).

In America and England

The term "capacity" is also used in these Jurisdictions to denote substantive rights in matters of succession. Thus, Wharton (§ 576) speaks of "personal capacity of successors," where the question is not properly one of status at all. Substantive rights of succession are determined by the law of the last domicile of the deceased, whereas questions of capacity proper are referred to the personal law (see Supplement to § 58, *supra*). Where the disability results from a condition or relationship considered a matter of public or national policy, such as infancy or marriage, only such disabilities as the local state imposes will be recognized (see Supplements to §§ 60, 63, *supra*). Conversely, where the local state imposes a disability for reasons of public policy, capacity will be determined by it alone (see Supplement to § 41, *supra*).

§ 136. The Capacity to succeed possessed by Natural Persons.

v. Bar, ii, p. 314.

Laurent, vi, Nos. 175-183.

Weiss, iv, pp. 551 *et seq.*

I. *Rights of intestate succession to the estate of a deceased are governed by the law to which the administration of the estate is subject. It will depend, then, upon the principle supported by the particular state in this regard.*

1. Keeping in mind that the term "capacity to succeed" refers to substantive rights, it will be that capacity which determines whether a presumptive heir possesses the degree of relationship entitling him to succeed.

Where aliens claim to be heirs to the estate of a native citizen, the determination of their claims will be in accordance with the law governing the *estate*, not the personal law of the claimants. The question as to what law governs the estate will depend upon the particular doctrine supported by the country obtaining actual control of it. Citizens of Germany claiming to be heirs of an estate in

England cannot refer to rules prevailing in Germany as to the degrees of relationship entitling them to succeed.

2. Savigny ("System," viii, p. 313) held that the personal capacity of persons (heirs or legatees) to succeed to an estate, in whole or in part, should be determined by their domicile, and not by that of the deceased. A similar view is supported by Laurent (vi, Nos. 177 *et seq.*) and by Weiss (iv, p. 552). Vareilles-Sommières (ii, pp. 308-310) says that, in general, even in intestate succession, the personal statute of the *heirs* is the standard:—

"Si les lois successorales sont des lois sur l'état, elles ne peuvent être que des lois sur l'état des héritiers, car le de cuius n'a plus d'état quand on s'occupe de sa succession."

But it is obviously necessary to know what law is applicable before we can know who is to be heir. These views, which no doubt state the law of France correctly, must be interpreted to refer to questions of capacity (to act) proper, and not to capacity (right) to succeed (see § 135, *supra*). In the latter case the question to be determined is whether such a family relationship existed between the presumptive heir and the deceased, as to constitute a normal basis for successory rights (*pretium sanguinis*). This must be referred to the law which governs the estate, because the family relationships of the deceased are primarily in question, not those of the heir. The law of the heir becomes material only when his rights depend upon certain acts or proceedings (*e.g.* an adoption or voluntary recognition in a foreign country), which give him a position equivalent to blood relationship. For then his rights are based upon circumstances independent of the personality of the deceased.

In order to express a denial by statute of successory rights, some French authors employ the phrase, "*incapacités créées spécialement en vue du droit de succession*" (Brocher, "*Cours de droit int. privé*"; approved by Vincent and Pénaud, "*Dictionnaire de dr. i. privé*," p. 826).

3. The Hague Conference of 1900 adopted the following provision in its proposed treaty relating to succession (Art. 5):—

"The capacity to succeed of legatees and donees is governed by their national law."

In the report of the committee (*Actes de la 3me Conférence*, p. 20) it is explained that this refers to "personal capacity to act"

or "status as such." But in view of the terminology adopted by the jurisprudence of most nations, the article is incorrectly drawn. Lainé, as well as myself (*Actes*, 1900, p. 118), opposed it for the reason that the word "*capacité*" has two different significations, which unite also in the German word "*Erbfähigkeit*." Lainé therefore proposed to add the words, "so far as the exercise of their rights is concerned" (*Actes*, p. 141), while I proposed that the article should read, "The disabilities of legatees and donees to receive property by succession, resulting from reasons personal to themselves, are governed by their national law" (*Actes*, 1900, p. 118). But neither amendment was accepted by the Conference (*Actes*, p. 142).

4. The Argentine Civil Code provides (Art. 3286):—

"The capacity to succeed is governed by the law of the domicile of the presumptive heir at the day of the death of the deceased."

But it appears from Art. 3283 that only actual capacity to act is intended. Art. 3283 provides:—

"The right of succession to the estate of the deceased is governed by the local law of the domicile of the deceased at the day of his death, whether the heirs be natives or aliens."

5. According to what has been said above, the system of law governing the estate is *properly* applicable to the following questions in particular:—

- (a) Whether the claimant possesses the degree of relationship necessary to succeed, and in what order of succession he shall succeed.
- (b) Whether the claimant is to be regarded as legitimate, adopted, or legitimated.
- (c) Whether the claimant shall be shut out for unworthiness (*indignité*). This question is indeed a difficult one. The French *Code Civil* contains provisions under the title "*Des qualités requises pour succéder*" (Art. 727); the German Civil Code under the title "*Erbunwürdigkeit*" (§ 2339); the Austrian under the title "*Ursachen der Unfähigkeit zu erben*" (§§ 540–543). The Secretary of Third Conference, van Cleemputte, also favored the view that the law of the inheritance must determine this (*Actes*, p. 117).
- (d) Whether, and in how far, the heir must account for property already received from the deceased (*collatio*).

(e) Whether the heir has a peremptory right of succession to a quota.

The question of peremptory succession is so important that it will be treated of specially (§ 143 *infra*).

II. *Modifications made to the foregoing principle by positive law.*

1. Art. 25 of the *German* Introductory Act provides:—

"The succession to the estate of an alien having a domicile in the inland at the time of his decease is governed by the law of the state to which he at that time belonged. A German may, however, enforce a claim to succeed to such estate, if the claim would be recognized by the laws of Germany, unless the state to which the deceased belonged, makes the laws of Germany exclusively applicable to determine succession to the estate of a German, resident in such state."

This article is, of course, subject to treaty provisions. Furthermore, it will naturally be made use of in practice only where the domestic German rule of succession is more favorable to German citizens than the law of the particular foreign state.

2. *France* has a special doctrine. The Statute of 1819 provides:—

"Art 1. Articles 726 and 912 of the *Code civil* are abrogated; aliens shall therefore have the right to succeed to, dispose of, and receive property in the same manner as the French, throughout the domains of the kingdom.

"Art. 2. In case of the division of an estate between alien and French coheirs, the latter shall be preferred, in regard to the property situated in France, to an amount equal to the value of the property situated in the foreign country from which they shall be excluded, whether by the laws or by local customs."

The following was the condition of the law in France prior to the Statute of 1819 (see Renault in the *Journal de dr. i.*, iii, p. 15):

(a) Aliens could inherit in France only in case French citizens could also inherit from their relatives of the same degree, in the particular state. If this were not the case, the estate went to the fisc (Art. 726, *Code Civ.*, repealed).

(b) A disposition in favor of an alien could be made only in case the alien could have made a disposition in favor of a Frenchman (Art. 912, *Code Civ.*, repealed).

The French Statute of 1819 abolished both these rules. It itself is still in force and therefore a Frenchman entitled by the laws of France to succeed to an estate is entitled to succeed to so much of it as is situated in the inland, even though the deceased

was an alien or not domiciled in France at his death (*système de détraction* or *droit de prélèvement*). The same system has been adopted in Belgium, the Netherlands, and Argentine (Civil Code, Art. 3470). The right of native subjects to succeed to estates of aliens in those countries is therefore determined by local law, as to so much of the property as is situated in the local state.

Treaties dealing with rights of succession are in force between various nations. They become operative where there are heirs in countries other than that in which the estate is located (see §§ 153 *et seq.*, *infra*).

The Hague Conference of 1900 proposed the following provision in its projected treaty upon succession (Art. 8; see § 159, *infra*):—

“With the exception of such dispositions as may be made by the deceased, within limits fixed by his national law, no preference or inequality shall be permitted as between heirs, legatees, or donees who are citizens of the contracting Powers, which shall accord any advantage by reason of nationality.”

Unfortunately, diplomatic negotiations have been made to have this provision omitted—no doubt at the suggestion of France.

3. The systems of law applicable according to the *Swiss Statute*, *N. & A.*, are:—

- (a) domiciliary law as to rights of succession (Art. 22),
- (b) national law (and forum) upon questions of civil status (Art. 8).

4. The *English* and *American* doctrine (Wharton, §§ 568 *et seq.*) is here again controlled by the distinction between movables and immovables (see *infra*).

III. *A doctrine contrary to that stated at I is sometimes supported. It is to the effect that a right of succession must be established according to the personal statutes of both the deceased and the claimant.*

This doctrine is usually proposed by authors when discussing the question of “unworthiness.” The Italian jurist Diena (“*Sulla legge regolatrice della capacità di succedere*,” p. 48) proposes to exclude a claimant from succession provided he be deemed unworthy, either according to his own national law, or that of the deceased, for an act wilfully performed by him. It would indeed be a strange anomaly were a state which regards a claimant “unworthy” to

succeed if guilty of the murder of the person through whom he claims, compelled as it were to reward him, simply because the system of law applicable to the *estate* had not yet enacted this principle. For this reason, Laurent claims that ineligibility by reason of unworthiness should be conceived of as a *universal* incapacity to succeed (vi, No. 183, p. 330). Even if tenable, the doctrine should be limited to this particular institute.

In America and England

The general principle followed in America and England to determine rights of succession is that as to so much of an inheritable estate as consists of immovables, the *lex rei sitæ* prevails, while the law of the domicile of the deceased at the time of his death will decide as to movables. This is so, whether the distribution occurs by testate or by intestate succession (*Ennis v. Smith*, 14 How. 400; *Potter v. Titcomb*, 22 Me. 300; *Wilkins v. Ellett*, 108 U.S. 256; *Ross v. Ross*, 129 Mass. 243; *Bruce v. Bruce*, 2 Bos. & Pul. 229; *Dogliani v. Crispin*, 1866, L. R. 1 H. L. Cas. 301).

The law of the last domicile of the deceased has been applied to determine the following questions:—

- (a) whether a legacy is adeemed by the legatee's death during the testator's lifetime, or whether it goes to the testator's representatives (*Anstruther v. Chalmers*, 2 Sim. R. 1; *Rockwell v. Bradshaw*, 67 Conn. 9; *Jarman on Wills*, ed. 1881, p. 5);
- (b) whether natural children are entitled to succeed (*Dogliani v. Crispin*, *supra*; *Enohin v. Wylie*, 10 H. L. Cas. 1);
- (c) whether a trust created by will is invalid as contravening the statute against perpetuities (*Cross v. U. S. T. Co.*, 131 N.Y. 330); the courts avoid the rule, however, where the property is to remain permanently outside of the forum (*Chamberlain v. Chamberlain*, 43 N.Y. 424; *Despard v. Churchill*, 53 N.Y. 192);
- (d) whether distributees are to succeed *per capita* or *per stirpes* (*Brocks Est.*, 51 Ala. 85; *Story*, § 481 a);
- (e) whether the claimant is entitled to succeed by reason of his degree of relationship with the deceased (*Lynch v. Paraguay*, 1871, L. R. 2 P. & D. 268; *Bruce v. Bruce*, *supra*; *Welles' Estate*, 161 Pa. St. 218; *Simonson v. Waller*, 35 N.Y. Supp. 201).

On the other hand, where a person has been given a status in a foreign state equivalent to that entitling him to succeed in the state

of the deceased's domicile (*e.g.* through adoption, or legitimation by postnatal marriage), the capacity thus created will be recognized, even though the state of the deceased's domicile does not recognize such capacity (*Ross v. Ross*, 129 Mass. 243; *In re Goodman's Trusts*, 17 Ch. D. (A. C.) 266). See Supplement to § 87, *supra*.

§ 137. The Capacity to succeed possessed by Juristic Persons.

P. Fedozzi, *Gli enti collettivi nel diritto internazionale privato con speciale riguardo al diritto di successione* (1897).

I. *Juristic persons (including states, charitable or philanthropic foundations), even though foreign, are capable of taking gifts and legacies by inheritance; the controlling system of law is that to which the estate is subject.*

1. The question as to who shall represent the foundation and receive the property destined for its use is one of the capacity to act and is governed by the law of the place where the foundation or charity has its seat. It is this law which determines who the legal representative shall be (*Journal*, xxvi, 877). In the decision of the court of Geneva, cited in the *Journal*, it was properly said: "In order to determine the capacity of a charitable institution situated in France to take under testamentary dispositions made for its benefit, it is necessary to examine into the French legislation and practice, which alone is authoritative in regard to such capacity."

2. On the other hand, the question as to what substantive requisites are necessary in order to take the benefit of an inheritance is governed by the law to which the estate is subject. Of course no institution contravening the domestic public law (monasteries, certain religious orders) will be permitted to take by succession, even though the foreign law applicable to the estate as a whole does not consider them offensive. As a rule, however, special limitations are required to shut out a foreign institution from succession (confer the Zappa case, note *infra*). Neither has a foreign state capacity (right) to succeed except in so far as it has a special duty to fulfil upon domestic territory (*e.g.* maintenance of an ambassadorial residence; home for invalid German soldiers at Cannes). See Fedozzi, p. 16.

3. The papal office, too, possesses capacity to succeed to an inheritance.

- (a) The matter has been frequently discussed in France (*Journal*, 1888, p. 524; 1892, p. 337; 1893, p. 384).
- (b) In Austria two pieces of land were willed to the papacy and were recorded in the name of Pope Leo XIII (*Journal*, 1895, p. 226).

II. *The Institute of International Law has framed conclusions upon this topic* (see *Annuaire*, xvi, p. 307; § 66, *supra*).

In America and England

The rule as stated by the author is generally recognized in America and England. Where personal property is left to a foreign corporation, even though for a purpose not approved of by the law administering the estate, it has been held that if there be no local rule of policy in the way, it will be delivered to the foreign corporation to be dealt with according to the laws to which it is subject (*Chamberlain v. Chamberlain*, 43 N.Y. 424; *Westlake*, § 282, and cases there cited). Again, it is held that statutory limitations of the right of bequest to charitable institutions are not applicable to bequests by testators domiciled in other states (*Crum v. Bliss*, 47 Conn. 592; *Healy v. Reed*, 153 Mass. 197).

In New York it has been stated that the legatee's capacity to succeed is governed by his own domicile. This premise is, as we have seen, contrary to the current of authority and must be limited even in the State in which it was expressed, to juristic or artificial persons, as the cases are all of bequests to foreign charitable institutions incapable of taking by the law of their seat (*Kerr v. Dougherty*, 79 N.Y. 327; *Mapes v. Society*, 33 Hun 360; *Mount v. Tuttle*, 1903, 82 N.Y. Supp. 655, which was a case of foreign testamentary trust). Conversely, where the law of the seat of the corporation does not contain the prohibition, although that of the testator's domicile provides for it, the bequest will be held valid (*Chamberlain v. Chamberlain*, cited *supra*).

Of course, questions of the descent and heirship of immovables will be governed by the *lex rei sitæ*, even where the claimants are foreign corporations. Thus, a Scotch will executed for the benefit of a Scotch charity cannot carry lands located in England contrary to the English statutes against mortmain (*Curtis v. Hutton*, 14 Ves. 537).

NOTE

An entire literature has been written upon the Zappa case, which arose out of the will of a Greek subject, domiciled in Roumania, by the terms of which Greece was made residuary legatee. The legal faculty of Berlin University rendered an opinion favorable to Roumania (*Zeitschrift für internat. Privat- und Strafrecht*, iii, p. 275). Von Streit expressed himself in favor of the claims of Greece ("*L'affaire Zappa*," Paris, 1894); so also did Weiss, Lainé, and von Martens (*Revue de dr. i.*, xxvi, pp. 165-201). Particular points of the case have been discussed by Fleischlen (*Zeitschrift*, iii, p. 117; *Revue*, xxvi, p. 95; *Journal*, 1894, p. 282; by Missir, p. 776). See also Desjardins (*Journal*, 1893, pp. 1009-1031). Another phase of the Zappa case may be noted in *Journal*, 1900, pp. 1033-1034.

§ 138. Real Property in the Law of Succession.

I. *In most countries of Europe, rights of succession to immovables are determined by the law applicable to the estate as a whole. The subjection of succession to immovables to the separate régime of the lex rei sitæ is not justifiable upon principle.*

1. Exceptions to what may be designated the European rule are France, Austria, and Russia. The fact that we find this to be the condition of the law in England and America is explained by the influence of the feudal system.

Peculiarly enough, we also find the incorrect theory supported obstinately in other quarters. The projected treaty of Montevideo goes still further in applying the *lex rei sitæ*. In Switzerland, too, a remnant of the old theory remains. Although the theory of universal succession prevails both intercantonally and internationally, the Federal Statute, *N. & A.* (Art. 28, No. 1), refers succession to land owned by Swiss citizens domiciled abroad, to the law and forum *originis* (not the *lex rei sitæ*), even though the foreign law of succession is applied to the estate in all other respects. Thus where a citizen of Zurich dies in England, leaving real estate located in Geneva, the law of Zurich is applicable to the succession to so much of the estate.

2. But even in the European countries constituting the exception, the division of an estate into movables and immovables for the purpose of determining succession is recognized as wrong on principle. Rénault (*Journal*, ii, pp. 329, 422; iii, p. 15) points out at length the arguments in favor of adopting the system of universal succession in international matters. In other words, the estate should descend as a unit, according to one system of law, no matter

what be the nature of the property or where it be situated. The celebrated Russian jurist, Martens ("*Droit international*," Léo's French translation, ii, p. 455), also energetically advances his opinion that a separate standard for immovables is contrary to fundamental legal conceptions in regard to the law of succession, and can be justified only by exclusively political considerations. The Austrian jurist, Jettel ("*Handbuch des int. Pr. u. Str. R.*," p. 64), is of the same opinion. Laurent (ii, No. 122) well says that by this view "our will is supposed to vary according to the nature and situation of the property." Continuing, he says: "Is our will different for movables than for immovables? No, certainly not. . . . A man's sole desire in regard to the succession to his estate is that his property shall pass to those who are designated by the law with which he is familiar, that is to say, his personal or national law."

The Third International Conference proposed the following provisions in its projected treaty:—

"Art. 1. Whatever be the nature of the property or its location, succession thereto is governed by the national law of the deceased.

"Art. 2. Immovables received either by inheritance, devise, or gift are governed by the law of the state in which they are situated, so far as concerns the formalities and requisites of publication demanded by this law for the creation, consideration, transfer, and extinction of real rights in the same, as well as for the right to possession as against third parties."

3. A wholly erroneous argument against the adoption of the personal statute in the law of succession is given by Vareilles-Sommières (see *e.g.* ii, 304 *et seq.*). He states that the transfer of ownership and the creation of real rights should naturally be determined by the *lex rei sitæ*, because the most important problem to determine is as to what shall be done with the property of the deceased; not so much as to who shall represent the person of the deceased. This premise seems to be wholly unfounded; it is *personality* which constitutes the central point in the law of succession.

II. *An exception is generally recognized in regard to family entails. Here the lex rei sitæ applies.*

This follows from the fact that the *particular* doctrine of entail is usually confined to the country in which the property is located. Furthermore, the incidence of title is taken out of its usual chan-

nels in that the will of the founder of the entail makes succession dependent "*ex pacto et providentia majorum*."

§ 139. Aliens and the Law of Succession.

I. *For a long time aliens were treated more unfavorably in succession than natives. The state insisted upon its so-called right of reversion ("droit d'aubaine") or else imposed a deduction ("gabella hereditaria"). The latter was a kind of tax levied upon estates taken out of the country, either through the incidence of succession or by emigration.*

1. These "rights" have been abolished in most countries.

2. Constitutional and treaty provisions are often to be found upon this subject.

II. *There are treaties which expressly establish a complete equality between aliens and natives in matters of succession. They do not, however, place foreign juristic persons upon the same level.*

III. *The tendency of modern law is doubtless toward the complete equality of aliens with natives.*

For the law as it exists to-day, attention is again called to the following (see § 136, *supra*):—

1. the *droit de prélèvement* existing in France and in countries of the French system ;

2. Art. 25, Introductory Act, German Civil Code ;

3. the laws of some of the Swiss cantons, viz. Appenzell (Act of April, 1861, Art. 16), Unterwalden (§ 220), St. Gall (Art. 159, Act of 1808, revised by the Act of 1826) ;

4. Art. 912 of the French *Code civil*, abolished in France by the Act of 1819, but still in the Civil Code of the Ionian Islands (Art. 807). This limits the testamentary capacity of aliens (see *Journal*, xxvii, p. 1035).

In America and England

See Supplement to § 41, *supra*.

§ 140. Gifts *causa mortis*.

I. *Gifts causa mortis are governed by the system of law which is authoritative in regard to the estate as a whole. It will depend, therefore, upon what system each particular state supports in regard to succession.*

1. This principle is particularly applicable to gifts not yet completely executed, as no separation from the main estate has occurred.

2. If the gift has been executed, it will depend upon whether the personal statute of the donor —

- (a) regards such a gift as a testamentary act in anticipation, or
- (b) declares them as prohibited.

There are certain circumstances under which some laws extend to executed gifts *inter vivos* the same legal effect as though made *causa mortis*. In general, however, the law applicable to the estate of the deceased will govern only in cases (a) and (b).

3. In Italy, gifts *causa mortis* are governed by the *lex patriæ*.

Art. 9, *Disposizioni*, contains the following: —

"La sostanza e gli effetti delle donazioni e delle disposizioni di ultima volontà si reputano regolate dalla legge nazionale dei disponenti."

The substance and effect of gifts *causa mortis* and testamentary dispositions shall be considered as governed by the national law of the disponent.

II. *Whenever juristic persons are permitted to acquire property by gifts causa mortis, the same principles will apply.*

However, special provisions are usually to be found upon this point. Thus: —

1. Arts. 932 and 1060 of the Italian *Codice civile* make official authorization obligatory.

2. Art. 910, French *Code civil*, provides: —

"Donations inter vivos or by will, in favor of hospitals, of the poor of a county, or of establishments for the public use, can only have effect if they have been authorized by an imperial decree."

Here also, then, the rule "*locus regit actum*" must be considered as modified (see § 55, *supra*).

III. *Legislation.*

In the projected treaty of The Hague relating to succession, we find the following provision (Art. 1): —

"The validity and effect of testamentary dispositions or of gifts causa mortis are governed by the national law of the disponent."

Arts. 2 *et seq.* refer also to gifts *causa mortis* (see § 159, *infra*).

§ 141. So-called Coercive Laws in regard to Succession.

Laurent, ii, No. 125.

Pasquale Fiore, *Elementi*, No. 396.

v. Bar, ii, p. 311.

1. *Certain laws are to be interpreted as coercive, in the sense in which Savigny employs the term, also with regard to rights of succession. This will result in the application of the domestic law, wherever the foreign national law amounts to a privilege, or represents a specialty or peculiarity not recognized by the internal state.*

The right of the first-born will serve us as a paradigm.

1. The question whether we can recognize a foreign system containing primogeniture will arise wherever the *lex patriæ* is the standard in succession, or where, as in Swiss law, its application is made optional with the testator, or where the treaties provide its application, or, finally, where it determines capacity to succeed.

2. The Hague Conference of 1893 agreed upon the following reservation, limiting the application of the national law, viz.:—

“with the express reservation that each state shall be left free to make such exceptions as it deems necessary from the point of view of public law or social interests.”

At the Conference of 1894 it was determined to put the reservation into a more concrete form (*Actes*, 1894, *Protocole final*, p. 8), and Art. 7 of the projected treaty of the Third Conference was finally made to read as follows (see § 159, *infra*; *Actes*, 1900, p. 245):—

“Notwithstanding the preceding articles, the national law of the deceased shall not be applied where it would tend to be in derogation of the coercive laws of the country where the application is to take place, whether positive or prohibitive, sanctioning or guaranteeing a right or social interest by an express provision applicable to succession, to gifts *causa mortis*, or to the wills of aliens.

“The application of territorial laws the object of which is to prevent the subdivision of landed property is also herewith reserved.

“The contracting states agree to communicate to each other the prohibitive or positive laws which they are entitled to make effective under the reservation of par. 1 and also the territorial laws referred to in par. 2.”

3. It cannot be denied that certain rules in relation to succession are of an ethical, social, or public nature; such, for example,

are the rules relating to the doctrine of "unworthiness," to testamentary freedom, to its limitations, to peremptory heirs, to the rights of illegitimate children. On the other hand, we must here again remember that the dominating principle of our topic is the equality in rank of all the private laws of the various civilized nations (see § 42, V, *supra*).

4. Any general formula referring the question to public law, would, if adopted, give the courts too wide a discretion in applying foreign law, as it is always a broad question whether the internal public law is or is not offended by such application. The main rule would thus be destroyed. It is therefore necessary :—

- (a) to specify by statute or in the treaties the particular cases where the domestic law shall be coercive ;
- (b) not to go so far as in effect to reverse the rule of conflict ;
- (c) to interpret the exceptions strictly.

II. *In placing barriers against the application of the foreign law, the proper principle is that only peremptory public or social grounds should be respected.*

1. Laws within the following categories may reasonably be interpreted as coercive :—

- (a) the prohibition of entails so as to prevent land from becoming inalienable (Art. 896, French *Code civil*) ;
- (b) the prohibition of dispositions in favor of religious institutions such as monasteries ;
- (c) the prohibition against perpetual servitudes ;
- (d) the prohibition against a too great dismemberment of land.

2. There are also certain questions in regard to succession, which, because of their close connection with the law of procedure, are governed by the domestic law, especially as to formalities, although in all other respects the foreign law of succession is applicable. Under this head we have rules dealing with :—

- (a) the securing of an estate in favor of the creditor, inventory, sealing, publication for heirs, opening of the will, *beneficium separationis* ;
- (b) the method of taking possession of the inheritance ;
- (c) the title acquired by succession to rights of prescription.

In this connection we may again refer to Art. 23, *N. & A.*, by which the last domicile of the deceased is designated as the place of opening the succession, even though the deceased has made his

national law generally applicable. In other words, it is not a question of the application of substantive law, but only one of security (cf. § 131, IX, *supra*).

§ 142. Concerning Husband and Wife.

Diena, *Condizione giuridica della vedova in relazione al diritto internazionale privato* (Turin, 1891).

L. Milhaud, "*De l'application dans les rapports internationaux de la loi du 9 Mars, 1891, sur les droits du conjoint survivant, particulièrement au regard des femmes originaires d'Alsace-Lorraine*," in *Journal de dr. i.*, xxiii, pp. 495, 795.

I. *The law of the estate generally determines the statutory portion and the eventual right of succession as between spouses.*

1. The right of succession was originally founded upon blood relationship, but in time the principle came to be broken, through the right to designate other persons by will. In this way a successory right in favor of the surviving spouse was gradually developed in laws regulating family relationships.

The claims of spouses in succession are treated in the same manner internationally as the claims of descendants. A change of domicile by the survivor does not effect an alteration in the application of the law (Art. 26, *N. & A.*).

The law applicable to the estate generally, will determine such matters as the following:—

- (a) the extent of the right of succession and the duties accompanying the same (e.g. securing the income);
- (b) the limits within which testamentary dispositions are permissible.

2. The same system determines the results which shall flow from remarriage or untoward behavior. These are not penalties, although they are nominally so designated (*pœna secundarum nuptiarum*).

3. Successory claims of surviving spouses made upon the basis of a foreign system of private law should not be denied recognition on the ground of public order, simply because the domestic law does not contain the same or a similar system of succession.

II. *Such claims as the spouses put forward upon the basis of their rights in regard to the marital estate are governed by the system of law authoritative upon that topic.*

1. It is well established that the property rights of the spouses represent a separate relationship, and must not be confused with their rights of succession. When a person bases a claim upon his rights in the marital estate as such (whether arising by law or by contract), he asserts precisely this, that a certain portion of the property does *not* belong to the estate in succession.

2. The system of law applicable to this separate claim can of course be different from that otherwise authoritative. Thus, where the spouses had their first matrimonial domicile in England, a widow's rights in the marital estate would be (according to the law of many countries) governed by English law, while a totally different system might apply to her successory rights.

III. *Whether rights of the spouses growing out of contracts for succession or testamentary dispositions become nullified through divorce is determined by the law governing the divorce.*

Such rights do become nullified where the law of divorce makes obligatory the settlement of all property relationships in the divorce proceeding. The former spouse may, however, claim by will, though the divorce has nullified all objective rights, at least where there are no positive provisions nullifying the latter also. Such a positive provision *is* to be found in the German Civil Code, § 2077, according to which an absolute divorce nullifies *all* relationships between the spouses, whether relating to matrimonial property or succession. It could indeed be said that testamentary claims are necessarily associated with the death of one of the parties, and that therefore the law governing the estate should be authoritative. But where the law of the place of the divorce requires that all property rights shall be decided incidentally with the divorce, it would seem that this law should control in all matters, even as to what rights are nullified *by reason of the divorce proceeding*.

§ 143. Peremptory Rights of Succession.

v. Bar, ii, pp. 334-336.

I. *The rights of peremptory heirs ("Noterben"; "heredes legitimi") and of persons to whom the law itself gives a right to a share of the succession ("quotité disponible"; "réserve") depend on the same system of law which regulates intestate succession.*

1. These rights are wholly independent of the will of the testator, and in fact represent rules operating against his will; it is

natural, therefore, that the personal statute of the deceased should govern.

2. The peremptory quota was regarded originally as a moral duty only, arising from affection or relationship (*officium pietatis*); only in the course of time did it attain the sanction of law. In the old Germanic laws it could be explained as a sort of joint ownership by the family, at least in relation to land. Were we to take this purely historical fact into consideration, it would not be altogether logical to refer the legal position of the peremptory heir to the personal statute of the deceased, especially where the personal statute is considered to be the law of the momentary domicile. The *lex rei sitæ* would certainly be more natural in relation to succession to land. But the conception of the peremptory quota became considerably altered in the course of time. According to modern views, it is a substantive right which the heir has, to have the estate dealt with in a particular way; in other words, it is right to prevent too great a liberality in dealing with the estate. In this light it is not strange to find that the question is referred to the same objective system of law which governs the estate generally.

3. Vareilles-Sommières (ii, pp. 325 *et seq.*) treats of the peremptory quota as a separate topic, and states that the laws relating to it differ in principle from the ordinary rules of succession. He defines them as "laws which give to certain relatives the right to cause a reduction, for their own advantage, of excessive liberalities indulged in by the deceased." He says further that such laws regulate the status of the persons entitled to the quota, but he reaches the conclusion that it involves a partial incapacity to dispose, and that such an encroachment on the part of foreign laws cannot be permitted (in France). This is particularly clear where the peremptory quota is greater than that of the French law, but even where it is less, the French law would still be applied, because of the "injustice" of the foreign law.

The jurisprudence of France seems to sustain these views (*Trib. Civ.*, Seine, June 14, 1901; *Jour. de dr. i.*, xxviii, p. 808), but other authors claim that they are indefensible on principle (Pillet, "*Principes de droit international privé*," p. 361, note). By analogy, then, the quota established by French law will not be applied in favor of French heirs where the property is situated abroad.

4. A natural child, voluntarily recognized, has not only a right

to succession, but a right to the reservation of one-half of his quota, according to the weight of French authority (see also Ger. Imp. Ct., Civil Cases, xlvi, p. 314).

II. *The principle as above stated is subject to modification where immovables belonging to an estate are located abroad in a country which subjects them to a separate system of law.*

How this rule works out in practice is clearly shown by a decision of the Civil Tribunal of the Seine in 1879, reprinted in *Journal*, vi, p. 549. The action was brought by a son against his mother, who had received from the father more by will than was permitted by the testator's personal statute. The estate contained land situated in America, and the action was dismissed on the ground that foreign real property could not be considered in the calculation.

The trend of French decisions upon this topic results from a tradition traceable to the old "*coutumes*" that the rights of the *héritiers à réserve* are considered as governed by statute real (*Trib. Civ., Seine, March 14, 1897*).

In America and England

Although the freedom to devise or bequeath by will is not limited in these Jurisdictions in the same manner, or to the same degree, as in most countries of the Continent, limitations of this kind are, nevertheless, found in statutes forbidding alienation of more than a certain quota of the estate in favor of charitable uses. The rule as stated by the author applies also to these Jurisdictions, *i.e.* the law of the last domicile will govern as to movables, that of the *lex rei sitæ* as to immovables (*Healy v. Reed, 153 Mass. 197; Westlake, 3d ed., p. 132*).

In the case of *In re Cruger's Will, 73 N.Y. Supp. 812 (1901)*, a will executed in France by an American citizen domiciled there was declared invalid as to so much as attempted to deal with a greater portion of his estate than was permitted under the provisions of the French *Code civil* relating to peremptory succession. The court also based its decision upon § 2694 of the N.Y. Code of Civil Procedure, by which the "validity and effect" of a testamentary disposition of personal property are regulated "by the laws of the state or country of which the decedent was a resident at the time of his death."

Exemption and homestead rights, though in their nature similar to peremptory rights of succession, are, for reasons of public policy, subject to the *lex rei sitæ* exclusively (Wharton, § 791).

§ 144. Testamentary Capacity.

I. *Testamentary capacity ("testamentifactio") is not regarded as a part of the status in international matters. Its consideration belongs, therefore, not to the Law of Persons, but to the Law of Succession.*

1. Testamentary capacity is that particular capacity to act which permits of undertaking a transaction which shall effect succession. This particular capacity is, as a rule, specially regulated by law. The capacity to act in ordinary cases refers to personal capacity to perform a transaction *inter vivos*, while testamentary capacity refers to acts taking effect only with death.

2. Questions involved here are particularly the following :—

- (a) validity of a provision instituting an heir (Roman law) ;
- (b) permissibility of a provision disinheriting a legal heir (the point may arise whether motives must be given) ;
- (c) designation of an alternate heir ;
- (d) legality of conditions ;
- (e) appointment of executors.

II. *According to the law prevailing in Continental Europe, testamentary capacity is governed by the personal statute of the testator.*

1. Legislation in some states expressly supports the domiciliary theory :—

(a) The code of Argentine provides :—

"Art. 3611. The law of the place where the testator is domiciled at the time of making his will determines his capacity so to do.

"Art. 3612. The effect of the will, its validity or its invalidity, is governed by the law in force at the testator's domicile at the time of his death."

(b) The Swiss Fed. Stat., *N. & A.*, provides (end of Art. 7) :—

"Testamentary capacity is determined by the law of the domicile at the time of executing the last will."

2. The Swiss statute above quoted applies also to aliens domiciled in Switzerland, although Art. 34, *N. & A.*, expressly reserves the provisions of the Federal Statute upon Personal Capacity (Art.

10, subd. 2 and 3), which make capacity to act depend upon the *lex patriæ* (excepting in regard to commercial transactions, which are not in question here). In other words, although Art. 7 above quoted appears under the title of "personal capacity to act," testamentary capacity should not be considered as a kind of annex to the status. However, even if it be taken as such, Art. 7 should still be applied analogously to aliens in Switzerland, as the Federal Statute upon Personal Capacity referred to in Art. 34, *N. & A.*, does not attempt to regulate testamentary capacity.

3. The German Introductory Act attempts to regulate only a special question under this head. Art. 24₃ provides that where a person alters his nationality after having made a testamentary disposition —

- (a) the validity of such disposition or its revocation is governed by the laws of the state of his former citizenship ;
- (b) the capacity to make a will, if possessed before the change, continues, although he has not attained the age required by German law.

4. English law here again makes a distinction between movables and immovables. Testamentary capacity is determined : —

- (a) by the law of the domicile in regard to movables ;
- (b) by the *lex rei sitæ* in regard to immovables.

Dicey lays down the following rule (No. 181, p. 684):—

"Any will of movables which is valid according to the law of the testator's domicile at the time of his death is valid."

Stewart Chaplin, in his "Treatise on Express Trusts and Powers" (New York, 1897, p. 629), says :—

"The validity of a testamentary disposition of real property depends on the law of the place where the land lies."

III. *The laws of many countries set up different requisites for testamentary capacity than for ordinary capacity to act.*

Minors

Even by the Roman law, "*puberes*" were entitled to make wills ; this has been followed by many modern systems, for example :—

France: persons over 16 years of age (*Code civ.*, § 904), at least as to one-half as much as adults.

Germany: at 18 years (Civil Code, § 2229).

Austria: at 18 years, orally before the court or notarially (§ 569).

Swiss Cantons: e.g. Zurich at 16 years (§ 993); Berne at 17 years (§ 552); Grisons (§ 502) and Basel (Law of 1884, § 55) at 18 years.

America: many of the States have laws extending to males over 18 and females over 16 years the right to dispose by will, at least in regard to personal property (Stimson, "American Statute Law," p. 345).

On the other hand, the requisites for testamentary capacity in England are the same as for ordinary capacity to act.

Even though a minor possess testamentary capacity, it does not follow that he can contest a will detrimental to him made by *another person*. The consent of his guardian is required here, as in other matters. *This* question is one of capacity to sue and is part of the status.

Prodigals

Persons interdicted for prodigality are usually permitted to retain their testamentary capacity under supervision of curatory.

Married Women

Married women are permitted to make wills:—

1. in France (§ 905, *Code civ.*).
2. in England (see Stocquart, *Journal*, xvii, pp. 735-742).
3. in many States of the American Union (Stimson, "American Statute Law," p. 345).

Criminals

In Austria, a person imprisoned for crime cannot make a will during the duration of his sentence. A person condemned to death may do so, however, from the time the sentence is communicated to him (Civil Code, § 574).

NOTE

According to the Roman conception, the "*apolidēs*" were incapable of making a will. See:—

L. 1, § 2, *De legatis et fideicommissis* III: "*His, quibus aqua et igni interdictum est, item deportati fideicommissum relinquere non possunt, quia nec testamenti faciendi jus habent, quum sint ἀπόλιδες (extorres).*"

§ 145. Restraints on Testamentary Dispositions.

v. Bar, ii, p. 329.

Diena, *Sulla legge regolatrice della capacità di succedere*, etc. (Bologna, 1897).

I. *The personal statute of the testator determines the legal restraints upon him in disposing in favor of particular classes of persons.*

1. There are laws which forbid the testator to dispose by will in favor of certain persons, as for instance:—

(a) witnesses to the will;

(b) physicians who have treated the testator.

Art. 909 of the French *Code civil* provides:—

"Doctors or surgeons, health officers and druggists, who have treated a person during the illness of which he dies, shall not be entitled to the donations *inter vivos* or bequests by will which he made in their favor during the course of such illness. Excepting, however, special provisions for compensation, taking into account the testator's means and the services rendered. . . ."

Some systems do not contain any such restraint, *e.g.* the Italian and the Austrian civil codes.

2. The question arises whether such restraints should operate territorially, or whether the personal statute of the beneficiary shall determine. Suppose a French physician treats an Italian during an illness in France and the patient afterwards dies in Italy; shall the French physician be considered incapacitated to receive a bequest on account of the French law? No. The limitation is one operating primarily upon the testator's power of disposition, and is on a parallel with peremptory rights of succession. It is true that the restraint might also be viewed as directed against the beneficiary, but the former purpose preponderates. These rules have for their object the protection of the testator from improper influences. The matter is therefore governed exclusively by the law which is applicable to the estate generally. This was also the opinion expressed by the International Conferences of The Hague. See also Diena, p. 24, cited *supra*, and Th. Messir, "*Des Donation entre vifs en droit int. privé.*" The latter says (pp. 33-36):—

"*Nous croyons que c'est toujours la loi nationale du donateur qui doit régir ce rapport juridique. Quoique le texte semble envisager cette incapacité comme une incapacité de recevoir, il apparaît clairement cependant qu'elle se résout en une véritable incapacité de disposer du chef du donateur.*"

It follows that if the law to which the estate generally is subject contains no such restriction upon the power of disposition, the legacy may be claimed, although prohibited by the jurisdiction to which the legatees are otherwise subject.

II. *The same principle applies in regard to legacies in favor of certain juristic persons.*

Where the law forbids bequests to particular classes of juristic persons, *e.g.* churches, monasteries, etc., or allows them only upon authorization by governmental authority (see *French Code civ.*, § 910), the juristic person can take only if it has capacity to do so *both* by the law of the testator and by its own law (see Supplement to § 137, *supra*).

III. *Where the ownership of land is involved, it is necessary to observe the formalities of the lex rei sitæ in order to acquire real rights.*

In America and England

The doctrine as stated by the author is applicable also to these Jurisdictions, it being remembered that the personal statute is determined by domiciliary law. In *Whicker v. Hume*, 7 H. L. Cases (1858), 124, 156, Lord Cranworth says: "Suppose there was a country in which the form of a will was exactly similar to that in this country, but in which no person could give more than half his property. Such an instrument made in this country by a person there domiciled, when brought to probate here would be admitted to probate as a matter of course. . . . How is the court that is to administer the property to ascertain who is entitled to it? For that purpose you must look beyond the probate to know in what country the testator was domiciled, for by the law of that country the property must be administered."

On the other hand, all questions concerning a restraint on the alienation or disposition of immovables are to be decided by the *lex situs* (Westlake, p. 191).

Both rules are similarly expressed in § 2694, N.Y. Code of Civil Procedure. See also *Vogel v. Lehritter*, 64 Hun 308, affirmed 139 N.Y. 223.

§ 146. Interpretation of Wills and of other Testamentary Acts.

v. Bar, ii, p. 336.

I. *The rule of "locus regit actum" governs the preliminary test*

whether the instrument is valid formally as a will or as a deed of gift or as a contract for succession.

The questions to determine in each case will be:—

1. whether the instrument be a will, *i.e.* a voluntary legal act, constantly revocable; or
2. whether the instrument be a contract for succession by which a definite and irrevocable relationship has been created; or
3. whether it be a mere gift.

II. *The interpretation of the substantive import of the various instruments of succession is referable to the usual rules of interpretation.* See § 50, *supra*.

Ambiguity may arise in designating the beneficiary (*e.g.* the English conception of "heir at law"), or in indicating the coinage (fl. and £; Austrian and Dutch gulden, Turkish and English pounds).

1. The law applicable generally to the estate will usually be authoritative also as to the interpretation of the testamentary act, *viz.*:—

- (a) the *lex domicilii* where this is the law substantively applied;
- (b) the *lex patriæ* where this is the theory supported;
- (c) the following standards in England and America:—
 - (aa) The *lex domicilii*, *viz.* the last domicile of the deceased in regard to movables (Wharton, § 592):—

"The law of the last domicile is the rule, subject to exceptions to be stated, because, in respect to personalty, it is the last domicile that is supreme." However, pursuant to Lord Kingsdown's Act, the domicile at the time of executing the will may be authoritative.
 - (bb) The *lex rei sitæ* in regard to immovables. Wharton says (§ 597) that a will executed in Holland in the Dutch language referring to land situate in England must be treated in the same manner as though executed in England (see *Bovey v. Smith*, 1 Vern. 85).

2. But even though the *lex domicilii* is otherwise controlling, a will, if formally perfect according to this law, will nevertheless be interpreted with a certain regard for the habits of speech and legal terminology in vogue in the national state (*v. Bar*, ii, p. 336).

On the other hand, even where the *lex patriæ* is controlling, regard should be had for the notarial or legal phraseology customary at the domicile of the deceased at the time of executing the will. In other words, the whole scope of the testator's language must be taken into account.

In America and England

A distinction must be made between the law as prevailing in England at the present time by reason of Lord Kingsdown's Act (24 and 25 Vict. c. 114), which is substantially followed by the legislation of some of the American States, and that which prevails in the absence of statute. The rule of the common law, as stated by Wharton (§ 592) and quoted by the author, is not entirely borne out by the American cases cited by him (see Moore's notes to Dicey, p. 708). It will no doubt be the correct solution in many cases, but as the question of interpretation is primarily one of the testator's intention, the rule applicable to wills would seem more soundly expressed if we take the standard applicable in contracts. In the absence of an absolute rule, that law will be applied with reference to which it may be inferred that the testator expressed his will (1 Jarman on Wills, 6th ed., notes pp. 1-3; *Geurard v. Geurard*, 73 Ga. 506; *Ford v. Ford*, 70 Wis. 19; 72 Wis. 621). However, the rule stated by Wharton has been enacted in some of the States. By § 2694, N.Y. Code of Civil Procedure, the "validity and effect" of testamentary dispositions of personal property "are regulated by the laws of the state or country of which the decedent was a resident at the time of his death."

The rule as stated by Wharton in regard to interpreting wills of *land* has been followed in many Jurisdictions (*McCartney v. Osborn*, 118 Ill. 403; *Richardson v. De Giverville*, 107 Mo. 422; *Yates v. Thompson*, 3 Cl. & F. 544, 588), but even here the domiciliary law would seem the proper standard as representing the system with which the testator was most familiar (so held, *Proctor v. Clark*, 154 Mass. 45; see also Minor, "Conflict of Laws," p. 341, n. 4).

By Lord Kingsdown's Act, "no will or other testamentary instrument shall be held to have been revoked or to have become invalid, *nor shall the construction thereof be altered*, by reason of any subsequent change of domicile of the person making the same." Accordingly, if there are circumstances pointing to the fact that the testator's language was used with reference to the particular construction given to it by the law of the place of the domicile at the time of drawing his will, such construction will be retained, notwithstanding a subsequent change of domicile. The

legislatures of some of the United States have adopted rules similar to the English Act (see Stimson's "American Statute Law," § 2653).

§ 147. Form of the Testament.

Duguit, *Conflits de législation relatifs à la forme des actes civils* (1892).

I. *The principle of "locus regit actum" finds recognition here, and the following proposition may therefore be laid down as the general rule :—*

The testator has a right of election in the execution or revocation of his will between the forms prescribed by his personal law and those of the place where the act is performed.

1. This proposition has been established by a long historical process of development, although not without repeated interruption and opposition. Even to-day we frequently find laws and decisions so expressed, as though the form of the place of execution was *obligatory*; but what is meant is simply that this form will *suffice* (see § 55, *supra*).

The principle above stated was recognized in early times (*e.g.* by Bartolus and Joannes Faber). Albericus de Rosate, quoting Cinus upon testamentary questions, laid down the rule, "*quod attenditur statutum vel consuetudo loci, ubi fit testamentum.*" Later this rule came into conflict with the maxim, "*toutes coutumes sont réelles*"; thus Masuer, a French jurist (died about 1449), held that a will validly executed according to the laws of the place of execution referred only to such real property as was situated at that place. Molinæus, however, re-established the correct principle expounded by the first Italian School (see § 25, *supra*). The same question was also discussed by the great Cujacius, in "*Observationes*," lib. 14, cap. 12, under the title, "*Cujus regionis mores legesve servari oporteat in peragendo testamento.*" In Germany the principle was recognized by Gaill, also by Hertius, but was contradicted in the Netherlands, especially by Everhard and Peckius (see § 26, *supra*). The rule was for a time regarded as *obligatory* instead of *elective* (Ulr. Huber, Nos. 3-4).

The rule is framed *obligatorily* in the projected treaty of Lima (Art. 22).

Though the Spanish Civil Code at Art. 11 states the rule as though it were *obligatory*, its *permissive* character is recognized by Art. 732 (see also Arts. 733, 734).

The rule of law acquires particular significance in regard to the revocation of testamentary dispositions, for the reason that some laws are more strict than others in construing what amounts to a revocation.

- (a) Suppose a French testator, whose estate is subject to the *Code civil*, revokes his will in Italy; on account of the permissive character of the rule of "*locus regit actum*," Italian law may be applicable in regard to form. Now, as this law (Art. 888, *Codice civile*) is less strict, and declares a will revoked by the subsequent birth of a child, it follows that the birth of a child in Italy would operate to revoke the will, although according to the personal statute, only two methods of revocation are recognized, viz. by a later will or by a notarial instrument.

This solution is a correct, though remarkable application of the rule of law cited. Compare Decision of the German Imp. Ct., xiv, p. 183.

- (b) Again, as it is not necessary that an act shall have revocatory effect according to the *lex loci actus*, in that it suffices that the personal statute effects this result, it follows that a revocation may be caused by a fact recognized as a revocation by the personal statute, though not by the *lex loci actus*; e.g.:—
 (aa) destruction of the instrument;
 (bb) sale of the thing bequeathed (Art. 1038, French *Code civ.*).

A doubt may also arise as to whether a testament be revoked by a new one, e.g. where the state before whose officials the former one was executed, recognizes a revocation only by virtue of the same formality, the testator, however, not observing this. If the second will is valid, and the former one considered revoked according to the law of the place where the second was executed, the revocation must doubtless be considered as effectuated.

2. The following examples are results of the rule:—

- (a) A German residing in Zurich may make a will pursuant to the forms of the German Civil Code (§ 2231) without depositing the instrument as provided by Zurich law.
 (b) A will executed in France, according to French law (*Code civ.*, Art. 970, "*testament olographe*"), must be recognized as valid in Switzerland, though not delivered to a notary (see Art. 24, *N. & A.*, and *Rechenschaftbericht*, Zur. Sup. Ct., 1892, No. 132).
 (c) An Austrian residing in Berlin may execute his will before an Austrian notary.
 (d) In Austria a will may be attested orally in the presence of the

court or witnesses (see §§ 587–590, Austrian Civil Code; L. Beauchet, "*Du testament fait par un mineur autrichien en pays étrangers*," in *Journal de dr. i.*, xiii, p. 683).

3. The determination of formal defects is within the jurisdiction of the judge who administers the succession.

4. Codicils should be held valid even though the law of the place of their execution does not permit of them, provided they are valid according to the law applicable to the estate generally. Some systems of law require that supplementary provisions by codicil shall be reserved in the will itself. It is clear that where the authoritative law of succession permits of holographic wills, no such reservation need be made, as supplementary provisions can be made at any time by new will.

5. The questions as to who may act as witnesses to a will, and their number, are matters of form, subject to the *lex loci actus*. Such witnesses are documentary only, giving effect to a legal proceeding *in presenti*, as opposed to other witnesses who give testimony upon observations made in the past. The provisions of the law of procedure are, therefore, not applicable.

Some systems provide positively as to the qualities which testamentary witnesses shall possess, *e.g.* § 999, Zurich Code of Private Law:—

"Testamentary witnesses can only be male persons having capacity to act, who understand writing, are neither blind nor deaf nor have lost their rights of citizenship."

All physicians and members of the clergy are excluded by § 1000.

6. Art. 11 of the German Introductory Act has correctly formulated the principle (see § 55, I, 4, *supra*).

7. The law of the Congo State provides (Art. 4):—

"Testamentary acts are governed as to their form by the law of the place where they occur, and as to their substance and effects, by the national law of the deceased.

"Provided, however, that an alien performing a testamentary act in the independent state of the Congo, be permitted to follow the forms provided by his national law."

8. The Swiss Federal Statute, *N. & A.*, is even more liberal than the rule as expressed (I), in that Art. 24 permits an election of any of the following, *viz.*:—

- (a) the law of the last domicile,
- (b) the law of the domicile at the time of executing the will,
- (c) the national law at the time of executing the will,
- (d) the national law at the testator's death.

It would seem to have been better for the statute to have adopted a wiser limit. It accomplishes freedom of action, but may lead to insecurity; perhaps even a draft may come to be regarded as a definite testamentary declaration. The Federal Court (*A. E.*, xxi, p. 990) states that the clear intention of the legislature was to dissolve all conflicts which might arise between the domiciliary and national law.

9. In France the following provisions of the *Code civil* play an important rôle, viz.:—

“Art. 999. A Frenchman who is in a foreign country may make his will by an instrument under private signature as provided in Art. 970, or by a public instrument according to the forms in use at the place where such instrument shall be made.”

“Art. 970. A holographic will shall not be valid unless it is wholly written, dated, and signed by the hand of the testator; it is not subject to any other formality.”

According to French law, therefore, a Frenchman sojourning abroad may make a will pursuant to Art. 999:—

- (a) either by a private instrument (*testament olographe par acte sous signature privée*), in which case the provisions of Art. 970 must be observed,
- (b) or by a public notarial instrument (*acte authentique*), in which case the observance of the forms prescribed at the place of execution will suffice.

This conception of the law is based upon the view that the rule “*locus regit actum*” applies only to public instruments. See *Journal de dr. i.*, iv, p. 149; xxiv, pp. 78, 508, 929.

10. In England the law of the domicile at the death of the testator was formerly exclusively applicable. According to Lord Kingsdown's Act of 1861, wills of personal estate are valid if they conform:—

- (a) either to the *lex loci actus*,
- (b) or to *lex domicilii* at the time of the death,
- (c) or to the law of the domicile of origin.

It was thus declared that a change of the place of sojourn can

never make invalid a will once validly executed. The text of the law is reprinted in Nelson's "Selected Cases, Statutes, and Orders Illustrative of the Principles of Private International Law as administered in England; with a Commentary" (London, 1889), p. 176, and is entitled:—

"An act to amend the law in relation to the wills and codicils of British subjects dying whilst resident abroad, and of foreign subjects dying whilst within Her Majesty's dominions."

II. *Some countries deviate from the principle above stated in regard to the form of wills.*

1. A passage interesting from the point of view of history is found in Alef († 1763), "*Dies academici*," *dis.* iv, No. 45, wherein he refers to the law of Bohemia:—

"Bohemi contra nullas omnino vires largiuntur testamento extra regnum facto; quamquam loci, in quo conditum sollemnitates ad amussim fuerint observatæ: nisi hæ vel sint eadem vel ampliores illis, quæ in Bohemia præscriptæ."

2. The Civil Code of the Netherlands (Art. 992) provides that a Netherlander executing his will in a foreign country must do so in the form of a public or notarial instrument, although the formalities prevailing as to the manner of execution in the country where the instrument is executed may be observed.

The practice of *French* courts, however, is to apply the rule of "*locus regit actum*" to wills executed by aliens in France, though the law of the home country does not recognize the rule. Thus, a holographic will made by a Netherlander in France was declared valid (*Cour d'Orléans*, 1859, *Journal*, x, p. 85). This decision was followed in regard to the will of a Russian (*Tribunal de la Seine*, 1883, *Journal*, xi, p. 405); and also in regard to the will of an Englishman (Court of Cassation, *Journal*, xi, p. 407).

Italy, on the other hand, submits the question of the validity in regard to form, to the national law. This was done in *In re Hendriks*, where the will in question was executed by a Netherlander in Belgium. The Court there stated that Art. 992 of the Code of the Netherlands was a restriction upon the capacity of their own citizens in a foreign country, in order to prevent fraud and undue influence through holographic wills, and was an exception to the rule of "*locus regit actum*" (Court of Appeal, Genoa,

Journal, xx, p. 955; Court of Cassation, Turin, *Journal*, xxi, p. 1083).

The exceptional rule prevailing in the Netherlands has also been recognized in Belgium (*Revue de dr. i.*, viii, p. 495).

3. Art. 1077 of the Russian Code provides (see Sérébrianny, in *Journal de dr. i.*, xi, p. 359):—

“Every Russian subject sojourning abroad may make a private will according to the usage of the country where he executes it; but such will must be presented to the Russian legation or consulate.”

It is thus clear that, notwithstanding the general application of the main rule in regard to the form of wills, it is nevertheless perforated with exceptions on account of laws of some countries that the national forms must be obeyed by their citizens while abroad.

III. *The main rule applies also to gifts causa mortis so far as concerns formality.*

These are expressly mentioned in Art. 24, Swiss *N. & A.*

IV. *The Third International Conference held at The Hague recognized the main rule, but left unaffected the anti-international provisions contained in the laws of some countries.*

Art. 2 of the projected treaty provides:—

“Wills and gifts *causa mortis* shall be valid as to form if they satisfy the provisions either of the law of the place where they are made, or of the national law of the disponent at the time of disposing.

“Nevertheless, where the national law makes it a necessary condition that wills and gifts made by a person away from his own country shall have a form prescribed by such national law, the will or gift shall not be made in any other form.

“Such wills of aliens shall be valid as to form as have been received by the diplomatic or consular agents of the home country, in conformity with the national law. The same rule applies to gifts *causa mortis*.”

From the point of view of future legislation it would seem that the limitations here made should be abolished. The period of human life is unfortunately so uncertain, that in regard to the execution of wills, the greatest amount of freedom should be extended.

In America and England

The rule of the English common law was that the formalities of a will of personal property must conform exclusively to the law

of the last domicile of the testator (*Potter v. Brown*, 5 East 130; *Robins v. Dolphin*, 1 Sw. & Tr. 37; *Dixon v. Ramsay*, 6 Cranch 319; *Gilman v. Gilman*, 52 Me. 165; *Moultrie v. Hunt*, 23 N.Y. 394). As we have seen, this has been modified by Lord Kingsdown's Act; but this statute applies only to *British* subjects; as to other persons, the common law rule still applies (*Bloxam v. Favre*, 1884, L. R. 9 P. D. 130). In this way the rule of "*locus regit actum*" as understood on the Continent of Europe, that is to say, with a permissive significance, has been adopted to a limited extent also in England.

By statute in some of the United States, the rule of "*locus regit actum*" has been adopted as an imperative rule, and then only, provided the place of executing the will is identical with the momentary domicile of the testator (Stimson's "American Statute Law," § 2653).

A peculiar rule has been enacted in New York in that the legislature has recognized the rule of "*locus regit actum*" within certain territory under the English system of law. The Code of Civil Procedure (§ 2611) provides that "a will of personal property executed without the State and within the United States, the Dominion of Canada, or the Kingdom of Great Britain and Ireland, as prescribed by the laws of the State or country where it is or was executed, or a will of personal property executed by a person not a resident of the State, according to the laws of the testator's residence may be proved as prescribed in this article. The right to have the will admitted to probate, the validity of the execution thereof, or the validity or construction of any provision contained therein is not affected by a change of the testator's residence made since the execution of the will."

As to real estate, the *lex rei sitæ* governs exclusively both in America and England (*Curtis v. Hutton*, 14 Ves. 537; *Lucas v. Tucker*, 17 Md. 41; *Applegate v. Smith*, 31 Mo. 166). Thus a will may be valid as to personalty and invalid as to realty, and a will which conformed to the *situs* of realty but not to the testator's last domicile was held valid as to realty alone (*Holman v. Hopkins*, 27 Tex. 38).

A will executed in France without witnesses as permitted by French law, by a person domiciled there, was held invalid as to leasehold property situated in England. A leasehold, though a

chattel descending to next of kin, is an interest in land and is treated as an immovable in international law (*Pepin v. Bruyere*, 1901, 83 Law Times Rep. 100). A will executed under the same circumstances but dealing with movables was held valid (*Tomlin v. Latter*, Chancery Division, February 8, 1900).

§ 148. Taking up Succession and reducing Legacies to Possession.

v. Bar, ii, pp. 341-344.

I. *Taking up succession can be validly accomplished only by respecting the system of law which regulates the succession itself.*

1. On the other hand, where the personal law of the heirs or legatees sets up particular subjective requisites in order to accept or decline an inheritance, these are to be regarded as limitations on the capacity to act, and therefore this system of law will control and not the law of the succession. Examples are furnished by:—

(a) married women; according to Art. 76, French *Code civil*, they cannot accept an inheritance "without the consent of the husband or of the Court";

(b) minors.

2. The *formalities* of taking up succession are regulated by the rule "*locus regit actum*." The law to which the estate is subject may, however, prescribe a particular form. See, for example, Art. 784, French *Code civil*, which requires all renunciations to be made at the office of the clerk of the court.

II. *The taking up of real rights through succession may also require the observation of rules established by the lex rei sitæ.*

These may refer to:—

1. formalities;
2. publication as against third persons;
3. transfer of ownership.

This was provided also by Art. 6 of the projected treaty of the Third International Conference (see § 159, *infra*).

§ 149. Distribution of the Inheritance and Function of the Courts.

v. Bar, ii, pp. 346-349.

Böhm, *Handbuch der int. Nachlassbehandlung, mit besonderer Rücksicht auf das deutsche Reich und die einzelnen Bundesstaaten* (2d ed., 1895).

Starr, *Die Rechtshilfe in Österreich gegenüber dem Auslande* (2d ed., Vienna, 1878).

1. The actual distribution of the estate is governed by the law applicable generally to the succession.

1. It follows, of course, from this, according to the English and American doctrine, that immovables are exclusively subject to the law of their situation.

2. But irrespective of the system of law applicable, the question arises how far shall the *courts* of the country of domicile, of sojourn, or of the situation of the property interpose. There are various systems.

3. A special function is exercised by English and American courts in matters of succession to intestate estates. The next of kin, even though he be an alien, is regarded as having the primary right to administration; by letters of administration issued by a court of probate, he may take into possession the movable estate and collect the debts of the deceased. But an English court will also respect the certificates issued by officials or courts of the deceased's domiciliary state.

4. In Austria, the rule prevails that the heir is not permitted to take possession of his inheritance by his own interposition. The right of succession must be determined by the court and the estate handed over to the lawful heirs by the officials of administration (Unger, "*System*," vi, § 39). The probate court (called "*Abhandlungsgericht*"), as the supreme legal representative of the deceased, also supervises the execution of the provisions of the testament (Unger, § 27). The Imperial Patent of 1854 contains provisions which must be observed before estate left within the domain by a deceased alien will be handed over to a foreign heir or administrator. The provisions have in view:—

- (a) security for the claims of Austrian heirs and legatees;
- (b) satisfaction for Austrian creditors.

5. In Switzerland, pursuant to cantonal law, the interposition of the courts is, *as a rule*, unnecessary. The heirs may take possession of the estate without such intervention. Of course such intervention does take place even in regard to local estates:—

- (a) where minors are heirs or legatees;
- (b) where, for the protection of heirs or creditors, a sealing up of the estate has been found necessary.

And in regard to the estates of aliens:—

- (a) where the heirs are not known ;
- (b) where the interests of the estate are endangered.

II. *Treaties sometimes impose special duties upon the officials of probate.*

Thus, many treaties provide that notification is to be given to the diplomatic or consular agents of one of the contracting states, in the event of the decease of one of its subjects within the domain of the other, leaving heirs unknown.

III. *Other points.*

1. In actions concerning inheritances brought in a foreign country after probate in the local jurisdiction, it frequently becomes necessary to produce the original will. This may be a matter of considerable difficulty. Thus the French law of the 25th *Ventôse* of the year 11 forbids notaries to part with any of their documents of record, except in particular cases and pursuant to decree of the court. A conflict resulted from this in a case at Neuchâtel. The French courts finally permitted a photograph to be taken of the original will, and the Swiss courts permitted the contents of the will to be proved by this means of reproduction (*Bundesb.*, 1889, ii, 718, No. 18).

2. Whether the renunciation of an inheritance in favor of a third person is permissible is subject to the law applicable to the succession generally (German Imp. Ct., Civ. Cases, xx, 234).

150. **Contracts for Succession.**

v. Bar, II, 340.

I. *The capacity to make a contract for succession is determinable by the law of the status.*

1. There are two classes of these contracts :—

- (a) contracts for succession in the narrower sense, viz. contracts instituting an heir or renouncing an inheritance (*pacta hereditaria*) ; these are contracts concluded between the future testator on the one hand and a presumptive heir or third party on the other ;
- (b) contracts relating to an inheritance from a third person (*pacta de hereditate tertii*), viz. contracts concerning an inheritance received or to be received, concluded between a presumptive heir on the one hand and a co-heir or other person on the other.

We are here dealing with transactions which, like wills, may alter the rights of succession resulting from blood relationship.

Contracts relating to vested inheritances (*δ*) need not be treated under this heading. They are governed by the rules relating to other obligations (*q. v.*). This was formally recognized by the Second Hague Conference, held in 1894; it proposed the following in its projected treaty (Art. 9):—

"Les conventions relatives au partage sont comme telles soumises à la loi qui régit les conventions."

An international regulation for the solution of conflicts is rather difficult here for the reason that some systems of legislation (*e.g.* that of France) do not recognize renunciatory contracts of succession.

2. Art. 7 of the German Introductory Act and Art. 10₃ of the Swiss Federal Statute upon Personal Capacity (see § 58, *supra*), do not apply here; in fact, the German Act expressly excepts transactions relating to succession.

The favorable provisions prevailing in respect of testamentary capacity do not apply unless the statute expressly so states. Thus, though minors above a certain age may make wills, they are not permitted to conclude contracts for succession. This follows from the difference underlying the legal nature of the two acts.

II. *The rule of "locus regit actum" is applicable to the execution of contracts of succession and their rescission.*

The rule is subject to exception:—

1. where the national law prescribes a particular form to be observed also by its citizens abroad;

2. where the local law prescribes a form *for the validity* of contracts of succession, which it is possible to observe in no other but the local state (*e.g.* "to be drawn by an officer in chancery").

III. *The personal statute of the contracting testator is applicable to the substantive requisites and legal effect of the contract.*

Sometimes it is the *lex patriæ* which is controlling, sometimes the *lex domicilii*, sometimes a combination of the two.

1. The draft of the German Code proposed the following in § 29:—

"Contracts for succession shall be judged by the law of the state to which the contracting testator belonged at the time of executing the contract. Whether a contract for succession is in violation of a peremptory right of succession and the effect of such violation shall be determined by the law designated in Sentence 1" (*lex patriæ*).

Although this provision was not adopted in the Act, it may be taken as stating a rule of practice.

2. The law of England and America (see Wharton, § 600), in harmony with its general system, sets up different standards in regard to contracts for succession, viz. :—

- (a) the law of the last domicile of the testator, for contracts referring to movables ;
- (b) the *lex rei sitæ*, if they refer to immovables. In commenting upon the rule in regard to movables, Wharton says :—

"It is scarcely necessary to say that immovables would not be affected by this rule, but would be controlled by the *lex rei sitæ*."

3. The Swiss Federal Statute, *N. & A.*, contains important provisions upon this topic (Arts. 24–26):—

- (a) the law of the first matrimonial domicile is applicable to contracts for succession made between betrothed persons or by marriage settlement ;
- (b) the law of the domicile at the time of executing the contract applies to all other cases and will determine between whom such contracts are permissible, what kind of contracts are permissible, their effect, and the requisites for rescission.

4. Whether such contracts are rescinded through divorce will naturally be a subject referable to the law which governs this proceeding. As a rule, contracts for succession become ineffectual by their own terms after divorce, because the condition under which they become operative, viz. the continuance of the marriage relation till death, no longer exists.

In America and England

According to the Continental conception, contracts for succession are testamentary instruments of an irrevocable nature, whereas in our law, though recognized as contracts, they are not given testamentary significance and do not restrain testamentary freedom. Thus, in *In re Keep's Will*, 1888, 2 N.Y. Supp. 750, where husband and wife had executed a bilateral contract for succession, and the

wife, after the husband's death, petitioned for the revocation of probate given to a will subsequently executed by her husband inconsistent with the provisions of the contract, it was held that the interest of the petitioner was only that resulting from a compact or agreement, and though perhaps enforceable by a court of equity as an equitable lien, could have no irrevocable or testamentary effect.

The rule as stated by Wharton is not supported by the citation of any English or American decisions, but it would seem to follow from propositions already stated for determining the validity of instruments taking effect with death.

§ 151. The Effect of Entry into a Religious Order upon the Capacity to Succeed.

Where the system of law applicable to the estate gives a civil legal effect to religious vows, there will be an incapacity to succeed.

1. Two different cases may arise, viz. :—

- (a) where the personal statute of the presumptive heir recognizes the incapacity, but the country administering the inheritance does not;
- (b) where the personal statute of the presumptive heir does not recognize the incapacity, but the country administering the inheritance enacts the veto.

We have seen under another heading (§ 136, *supra*) that, as a matter of principle, the law to which the estate generally is subject will control in both of these cases.

2. There is, however, something to be said in favor of the view that a person who has taken the *votum paupertatis* has renounced, at least for himself, all rights of succession; the contrary view results in an enrichment of the foreign monastery at the expense of the local relatives of the deceased. Boullenois ("*Traité de la personnalité et de la réalité des loix*," i, p. 65) characterizes the monk as follows: "*Cet homme cesse d'avoir aucune agnation dans ce monde, elle est réservé pour le ciel.*" Laurent ("*Droit civil international*," vi, Nos. 178–180) reaches a different result. He considers monasticism a disgraceful element in modern society, and the voluntary servitude of the monk to be the outcome of a folly which law should not respect. In other words, the vow should not be regarded as an act of free will, and the foreign country where such disability does not prevail ought not to construe it as an

incapacity to succeed. Laurent then points out the startling result that, by regarding the foreign monk as having full capacity, the local state actually favors monasticism, thus tending to accomplish an end intended to be avoided. But this, he hastens to add, is merely a point to be considered by the legislature and does not affect the legal conception.

Story ("Commentaries on the Conflict of Laws," 8th ed., § 104) declares himself *against* the recognition of foreign disabilities on the ground of heresy, excommunication, infamy, and the like, regarding them as strictly territorial. See also § 92.

Wharton ("Conflict of Laws," 2d ed., § 107) says:—

"It has also been questioned whether an ecclesiastic who has made a vow of poverty, which vow the law of his domicile regards as binding and operative, is capable of inheritance in a foreign land. Eminent German jurists hold that when this vow is voluntary, the incapacity is extra-territorial. But while the courts of his domicile might enjoin him from accepting such inheritance, his incapacity in this respect would not be recognized in countries where this form of civil death is not sanctioned."

§ 152. Rights of the State in Succession.

v. Bar, ii, p. 351.

Fedozzi, *Gli enti collettivi nel diritto internazionale privato*, pp. 66–98.

Mamelok, *Die juristische Person im internationalen Privatrecht*, pp. 131–141.

I. *The question as to which state shall have the right to property left without an heir is dependent upon the legal construction to be given to this right and also upon whether the system of universal succession be recognized. Properly, the personal statute of the deceased should determine.*

1. Burgundus was chief among the ancient authors occupied in determining the nature of the right which the state has *in bona vacantia* ("Tractatus," xiii). The right admits of various constructions, viz.:—

- (a) As a true right of succession. Savigny held that the right of the fisc was in its legal nature a true and real right of succession, though not so called (viii, p. 315). He therefore proposed to apply the *lex domicilii* irrespective of the *loci* of the parts of the estate.

This view has been adopted by Dernburg, Vangerow, and Windscheid. The Roman authorities seem to favor it too (*e.g.*

Lex 4 C. De bonis vacantibus, 10, 10), as does also the German Civil Code (§§ 1964-1966). In modern times, the tendency in thought and speech is so to do, even in countries where this is not the *legal* conception.

- (b) As a right of occupation or of sovereignty. The inheritance becomes here "*res nullius*," and the fisc of the state *rei sitæ* takes possession of property within its territory which, according to its own law, has no heir. This is the theory of the French Civil Code (Art. 713), and of Austrian and Italian jurisprudence. It was also followed in the projected Treaty of Lima (Art. 24).
- (c) As a right of escheat belonging to the feudal overlord so far as concerns immovables. This conception prevails in England and America, and harmonizes with the fact that the idea of universal succession, according to which the estate is regarded as a unit, has not been adopted there (Wharton, §§ 602-603).

[The doctrine of these jurisdictions was squarely determined in a recent English case (*In re Barnett's Trusts*, Ch. Div., March, 1902, 112 Law Times 500). An Austrian citizen, who had died intestate and without kindred while domiciled at Vienna, left certain personal property situated in England. The Austrian Finance Minister claimed the property as personal heir by the law of succession prevailing at the deceased's last domicile. It was held that the property fell to the English Crown, not by succession, but in exercise of its sovereign power; not through the person of the deceased, but as *glans caduca*, "the acorn which had fallen from the tree." — *Trans.*]

2. As the personal statute of the deceased is the most general standard for the *universum jus defuncti*, this system would seem the correct one to apply here too. This is the view of von Bar (ii, p. 351). Thus, where the *lex patriæ* is applicable to succession in general, it will be the fisc of the state of which the deceased was a citizen that will be considered the heir at law.

The Hague Conference of 1894 proposed the following (Art. 10):—

"Inheritable property shall not be acquired by the state within the territory of which it is situated, except in case there be no party entitled thereto according to the national law of the deceased."

In the treaties proposed by the Conferences of 1900 and 1904 this provision was omitted.

II. *The question in hand has been regulated by treaty between certain countries.*

1. In the Consular Treaty of 1866 (*Declaration interprétative*) between France and Brazil, the following provision is to be found:—

“If the estate of a subject of one of the two contracting powers, who has died intestate in the territory of the other, becomes vacant, that is to say, if no relative or heir within a degree of inheritance survive him, the estate, movable as well as immovable, shall devolve upon the state within whose territory he has died.”

2. In the Consular Treaty of 1879 between Italy and Servia, and also that of 1880 with Roumania, a provision to the same effect is contained (Art. 3):—

“In the absence of heirs or representatives, the estate shall be dealt with in the same manner as that of a citizen of the country under like circumstances.”

The Consular Treaty between Italy and Brazil is of like effect (Fedozzi, p. 82).

Catellani (“*Il diritto internazionale privato*,” etc., iii, p. 795) raises the question as to whether these regulations are in accordance with the domestic Italian law of conflict, and Fedozzi (p. 82) replies that they represent a flagrant contradiction of it, “*Questo regolamento di partita in dare ed avere è illegale di fronte al nostro positivo. . .*”

III. Suggestion for future legislation.

It would seem to be a rational solution of the problem, to provide for a *division* of heirless estates between the national and the domiciliary state.

NOTE

The passage in the *Corpus juris*, L. 4 C. de bonis vacantibus, 10, 10, is as follows:—

“*Vacantia mortuorum bona tunc ad fiscum jubemus transferri, si nullum ex qualibet sanguinis linea vel juris titulo legitimum reliquerit intestatus heredem.*”

The general terms of the *lex* would seem to warrant construing it as a rule of conflict.

§ 153. Treaties regulating the Law of Succession.

1. In view of the fact that the Law of Succession is of such great importance in international intercourse, many states have concluded treaties regulating questions incidental to this topic.

1. The usual rules of interpretation apply to such treaties, and

as has already been said, they are subject to the function of the courts (see § 50, I, 3, *supra*).

We will not attempt here to cite all the existing treaties dealing with questions of succession; we will simply select a few as examples.

2. Where matters of succession are regulated by treaty in general terms, all incidental questions are intended to be covered, unless special exceptions are mentioned. The following points may reasonably be deemed included:—

- (a) succession by will or by operation of law, even though both categories are not separately treated;
- (b) the amount of the peremptory quota and the question of exemption from advancing security;
- (c) collation or deduction for advances;
- (d) rules in regard to contracts *inter vivos*, so far as they are intended to take effect only with death; their formal and substantive validity.

Treaties frequently make a particular law and forum the standard (*e.g. patriæ* or *domicilii*) without defining the application of the standard in detail. In such cases the law or forum designated is authoritative in regard to accessory, conservative, and pre-judicial questions (Vincent, *Revue de dr. i.*, 1889, p. 123); also in regard to preliminary matters incidental to the succession, *e.g.* the taking of an inventory, the appointment of an administrator in case of a dispute. These matters are all within the law of succession. The *hereditatis petitio* embraces as *causa major* all other incidental questions, such as the validity of an adoption relied upon as the basis of the right of succession, loss or renunciation of a former citizenship, or acquisition of a new one.

There are practical reasons why the *hereditatis petitio* should have special significance where treaties have been concluded, and why a uniform law and forum should be provided. A multiplicity of actions is thereby avoided as a defendant is saved from being burdened with a whole series of actions in different states. A uniform fixed law and forum also constitute a guarantee against the theoretical and practical possibility of having contradictory judgments in different states. By fixing a uniform law and forum, the treaties should and do have in mind the universality of the estate and the prevention of its dissection according to the territorial situa-

tion of its various parts. Neither should the action to establish substantive rights of succession be permitted to be divided between two sovereign jurisdictions.

On the other hand, claims arising out of marital property relationships are to be distinguished from rights of succession. Such claims are based upon the contention that particular property does *not* belong to the successory estate at all, though the spouses usually have objective rights of succession too.

II. *The treaties now existing support various systems.*

The following treaties support the system of the *lex patriæ* and the *forum patriæ*:—

- (a) the treaty of 1866 between France and Austria (*Journal de dr. i.*, ii, p. 327);
- (b) the treaty between Austria and Servia (*Journal*, xi, p. 28);
- (c) the consular treaty of 1881 between Germany and Greece;
- (d) the consular treaty of 1883 between Germany and Servia;
- (e) the consular treaty of 1896 between Germany and Japan (*Zeitschrift für internat. Privat- und Strafrecht*, vii, p. 85).

The following support the system of the *lex* and *forum patriæ* in regard to the movable estate, and the *lex rei sitæ* in regard to immovables:—

- (a) the treaty between Germany and Russia (see Imp. Ct., Civ. Cases, xxvi, pp. 117-132);
- (b) the treaty between France and Russia.

III. *These treaties become applicable whenever a citizen of one of the contracting states dies while domiciled in the other.*

[§§ 154, 155, and 156 omitted.]

§ 157. The Treaty of 1850-1855 between the United States of America and Switzerland.

A. Slg., v, p. 201.

Botschaft des Bundesrates, Bundesblatt, 1850, iii, p. 727.

Botschaft des Bundesrates, id., 1855, ii, p. 39.

Bericht der nationalrätlichen Kommission, id., 1855, p. 423.

This treaty will serve by way of illustration.

A convention was concluded between the two countries, 1847-1848, to continue in effect for twelve years, by virtue of which rights of deduction and reversion were abolished.

The newer treaty, relating to "friendship, settlement, commerce, and extradition" (*id.*, 1855, ii, p. 53), treats of the following subjects:—

1. settlement of the citizens of one state in the territory of the other;
2. rights of free disposition in relation to property;
3. consulates;
4. extradition of criminals. This part of the treaty has been superseded by the extradition treaty of 1900, in force since March 29, 1901.

The part of the treaty relating to the topic under discussion, is Art. vi, which originally read as follows:—

"Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property (whether personal or real) is situated."

Referring to this passage, the Swiss Federal Council, in its message of 1850, remarks as follows (*Bundesb.*, 1850, iii, p. 737):—

"This somewhat ambiguous provision is a repetition of the convention of 1848. The expression, 'according to the laws and by the judges of the country in which the property lies,' can have a varying significance. It must refer to the judges and the laws of the country administering the estate, as it is usually there where the property or the largest part thereof is to be found; so that the judgment of these judges will refer to all the property making up the estate, no matter in what country it may be situate. This was the intention of the parties in 1848, as is shown by the context of this clause in the convention and the position which it occupies.

"But this wording could also be understood to mean that the question as to whom shall belong the property making up the estate shall be determined by the judges and the laws of the country in which each part of the estate is situated, viz. by the judges and the laws of the United States as to property located there, by the judges and the laws of Switzerland for that located there, and by the judges and the laws of every other country as to the property or any part thereof located therein.

"In order to dissolve this ambiguity, and to arrive nearer to what is usually accepted in regard to the application of the laws, the Council proposed that such disputes should be determined by the courts of the place where the inheritance occurs (viz. of the last legal domicile of the deceased), that disputes arising out of formalities

employed in making wills, gifts, or other instruments should be determined by the laws of the place where the instruments have been executed; that the capacity to make a gift or will or conclude a contract should be governed by the law of the country to which the person making the disposition belongs; and that the substance of the instrument itself be judged according to the laws of the country where it is intended to have effect.

"These proposals could not be accepted by the American representative, partly for the reason that there the judges are usually not permitted to decide otherwise than by the laws of the land, partly because the same court could thus be called upon to decide according to the laws of two or three different countries in the same case, viz. according to the national law of the disponent, the law of the place where the instrument was executed, and finally the law of the country or countries where it shall have effect, which would result in complication and delay."

When Arts. i, v, vi, and xix of the treaty were edited anew, the words "whether real or personal," contained in parentheses, were eliminated in conformity with changes made in Art. v (*Bundesb.*, 1855, ii, p. 51), so that Art. vi reads now precisely as above quoted, with these words omitted.

1. *The lex domicilii is made controlling by this treaty in relation to movable property. In this regard the estate is to be treated as a unit.*

1. Some authors have held the treaty to have sanctioned the *lex* and *forum rei sitæ* for actions in succession (Schoch, Art. 59, "*Der Bundesverfassung*," etc., p. 133); but this opinion is incorrect. Nor can we agree with Wahl, who, in the *Journal de droit international* (xxii, p. 727), states that an agreement has been arrived at by the treaty to regard the situation of movables to be at the domicile of the deceased. Although this was not the original intention, the treaty is now no doubt to be interpreted as though that were the case.

2. The Swiss Federal Court (*A. E.*, ix, p. 515; xxiv, pt. 1, p. 319) has also interpreted the treaty in this sense. In the decision first cited, it is said:—

"An agreement between the two contracting states to treat the estate as a unity may doubtless be implied, at least so far as the United States so treats it, and so far as it is generally so recognized in international law, viz. as to movable property. For it is well known that the English-American law recognizes the unity of the

movable estate in succession and subjects it to the law of the last domicile of the deceased, although the *lex rei sitæ* is declared authoritative for immovable property; the last domicile is considered the situation of all the several movable parts by the fiction of *mobilia ossibus inharrent*. It may therefore be taken that the contracting states were agreed that, at least so far as movables were concerned, the expression as to the laws and judges of the country, 'where the property is situated,' refers not to the laws and judges of the countries where the several movables actually are located, but to the laws and judges of the last domicile of the deceased, at which the several movables are regarded as located by virtue of a legal fiction."

The Court of Appeal and Cassation of the canton of Berne also decided to this effect in 1885 (*Revue*, ii, No. 137). A Swiss citizen died in Thun, leaving certificates of deposits of moneys and a piece of land, both items of property being situate in America. The brother of the deceased brought an action in Thun, the last legal domicile, for the recognition of his right of succession as against the widow. The latter's plea of the ineligibility of the brother was sustained in respect of the real property, but dismissed as to the rest. The court based its decision upon that of the Federal Council as to the personal property, but as to the real property, the court took notice of the fact that the words "whether personal or real" were struck out of the treaty because the United States did not wish to recognize the right of aliens to acquire real property in contravention of legislation in some of the States, excluding aliens from this right.

3. Roguin remarks of the treaty with the United States ("*Conflicts des lois suisses*," etc., p. 315):—

"It has been definitely admitted that, though speaking of the situation of property, the authors of the treaty intended to denote the domicile of the deceased."

Not without reason does he add, "Is not such an error scandalous?"

II. *An American citizen domiciled in Switzerland cannot take advantage of Art. 22, N. & A., permitting a choice of law.*

This follows from the fact that the treaty fixes objectively once and for all, the law, whether American or Swiss, which shall be applicable in matters of succession. It is true, it might be said in

opposition to this view, that the treaty is not entirely clear and does not expressly exclude special declarations of this kind. Still Art. 22 is unique and modern and peculiarly Swiss (see § 134, *supra*); at the time the treaty was concluded it was yet unknown, although even under the law authoritative then, the application of the law was partly within the will of the testator for the reason that he could alter the system by changing his nationality.

III. *The treaty contains no provision recognizing the rule of "locus regit actum" in regard to the form of wills.*

It follows, therefore, that an American citizen executing his will in Switzerland while sojourning there, can take no advantage of this rule, at least in respect to real property, as his *lex domicilii* does not recognize it.

§ 158. Interchanges of Declarations between States.

Some few states (*e.g.* Austria, Brazil, Switzerland) have made diplomatic interchanges of declarations relating to certain points in the Law of Succession. These are to be distinguished from treaty provisions in the absence of special authorization from the treaty-making body. Such declarations can affect administrative details only.

§ 159. The Labors of the Hague Conferences relative to Succession.

The most important provisions of the treaty proposed by the Conference of 1900 (*Actes*, pp. 244-246) have already been discussed in the preceding pages. It suffices to say that it was not received with enthusiasm by the nations participating. As a result, the government of the Netherlands did not advise even its preliminary adoption. The subject was again taken up by the Conference of 1904 upon the basis of a series of criticisms made by various nations (*Documents relatifs à la 4^{me} Conférence*, 1904, p. 28).

The projected treaty of the Fourth Conference differs materially from the prior one. It bears the title, "Project of a convention to regulate the conflict of laws in regard to succession and wills." The delegates have now shown a tendency to deal with certain isolated questions of the Law of Succession instead of with all the questions connected with it. It was expressly stated that the convention is not intended to regulate:—

- (a) gifts,
- (b) contracts for succession,
- (c) the rights of juristic persons in matters of succession.

The principal characteristics of the treaty may be stated as follows:—

1. It enacts the universality or unity of estates—so that immovables may not be subjected to the law of their situation in respect of succession.

This rule is considered of great importance in Continental Europe, though in France, Belgium, Netherlands, Austro-Hungary, and Russia the system of the *lex rei sitæ* is still supported. The American jurist, Kent, was in considerable error when he assumed to assert (12th ed., Holmes, ii, pp. 429–431) that it is well settled “in the law of all civilized countries that real property, as to its tenure, mode of enjoyment, transfer and descent is to be regulated by the *lex loci rei sitæ*.” Even in the Continental countries mentioned, the legal authorities are against it (*e.g.* Martens-Leo, “*Droit international*,” ii, p. 455). The estate should not be cut up and subjected to various systems of law.

2. The treaty subjects the estate of deceased persons to their national law in respect of the descent to the heirs, the rank of the heirs, their quota, representation, deduction for advances, and the peremptory quota.

Norway, Denmark, and Switzerland have up till now supported the principle of the domicile. As a delegate of Switzerland, I attempted a compromise between the laws prevailing in these countries and those in force throughout the rest of Europe (*Actes de la 3^{me} Conference*, pp. 85–89). I proposed, among other things, to let the *lex patriæ* govern, but to give the testator the right by a formal act (*e.g.* by will) to designate the law of his domicile,—this being the converse of the rule prevailing in Switzerland (see *supra*, § 134). In support of my proposition, I pointed out that under modern conditions there are many individuals intimately connected with the domiciliary state, and that it is, therefore, improper to restrict them to the particular law of succession prevailing in the national state, to which they are bound by weak ties only.

But the majority of the delegates continued to hold the view that the national law must alone be authoritative.

3. The treaty provides that aliens shall be on equal footing with natives in respect of succession. This provision was necessary because, as we have seen, some countries of Europe still give prior rights to native subjects over property situated in the local territory (*e.g.* France).

4. An attempt is made to specify the so-called coercive or prohibitive rules by means of declarations to be given by the participating nations within a certain time (Art. 6). This matter is to be taken up at a future conference. Art. 8 of the treaty provides as follows:—

“As soon as possible after the signing of the present convention, the contracting states shall agree upon rules of competence and procedure in regard to succession and wills.

“The convention containing these rules shall be ratified at the same time as the present convention.”

PART THREE

INTERNATIONAL COMMERCIAL LAW

SPECIAL AUTHORITIES UPON INTERNATIONAL COMMERCIAL LAW

I. A work dealing independently with this topic is:—

Diena, *Trattato di diritto commerciale internazionale ossia il diritto internazionale privato commerciale*. Vol. i: "Parte generale" (1900); vol. ii (1903).

II. Reference may be made further:—

1. To works upon International Private Law, *e.g.*:—

v. Bar, *Theorie und Praxis des internationalen Privatrechts*, ii, pp. 129–150; translated into English by G. R. Gillespie (2d ed., 1892).

Surville et Arthuys, *Cours élémentaire de droit international privé* (3d ed.), p. 505.

Weiss, iv, p. 321 *et seq.*

2. To works upon Commercial Law, *e.g.*:—

Pardessus, *Cours de droit commercial*, 4th ed., v, No. 1482 *et seq.*

Massé, *Le droit commercial dans ses rapports avec le droit des gens et le droit civil*, 2d ed., i–iv.

Lyon-Caen et L. Renault, *Traité de droit commercial*, 2d ed.

Brinkmann-Endemann, *Lehrbuch des Handelsrechts*, § 9.

Endemann, *Das deutsche Handelsrecht*, 3d ed., § 9.

Endemann, *Handbuch des deutschen Handels-, See- und Wechselrechts*, i, p. 108.

Thöl, *Handelsrecht*, 6th ed., i, § 17.

Goldschmidt, *Handelsrecht*, 2d ed., i, § 38.

Goldschmidt, *System des Handelsrechts im Grundriss*, 3d ed., pp. 18–19, 80–81.

v. Stubenrauch, *Handbuch des österreichischen Handelsrechts*, § 10.

3. To works upon Comparative Law:—

Goldschmidt, *Handbuch*, 3d ed., i, 1891. "Universalgeschichte des Handels."

Späing, *Französisches und englisches Handelsrecht im Anschluss an das deutsche Handelsgesetzbuch* (1888).

Lyon-Caen, *Tableau des lois commerciales en vigueur dans les principaux États de l'Europe et de l'Amérique*, 2d ed. (1881); *Journal de dr. i.*, iii, pp. 85–93 and 165–178.

O. Borchardt, *Die geltenden Handelsgesetze des Erdballs, gesammelt und ins Deutsche übertragen*, Berlin, 1883–87, i–v. Suppl., 1893–96, i–iii.

L. Levi, *International Commercial Law, being the Principles of Mercantile Law of the Following and Other Countries, viz., England, Scotland, Ireland, British India, British Colonies* (2d ed., 1863), i–ii.

COMMERCIAL LAW PROPER

§ 160. Introductory Remarks.

Gianzana, *Il diritto commerciale e marittimo internazionale privato. Discorso.*

I. International Commercial Law (including the Law of Bills and Maritime Law) is that complex of legal rules and maxims which divide off the jurisdiction and the laws of various nations when legal relations of a commercial, exchange, or maritime nature produce, or seem to produce, competition or conflict among such laws.

In other words, International Commercial Law is concerned with those cases of conflict which result from the coexistence of a number of systems of commercial law in different independent states. Such a conflict of laws may arise, for instance:—

1. where a Frenchman of twenty years of age enters into commercial obligations, or obligations by bill or promissory note in Austria;
2. where two ships of different states collide upon the high seas (*abordage*);
3. where branches of a German mercantile house do business in France.

Rights arising in the course of trade and commerce are not usually submitted to the *lex patriæ*; it is rather the domiciliary law that finds its normal application here. We are now dealing exclusively with matters of business, wherein personality comes but slightly into question. The conflicts arising in practice in this domain of law are considerable, notwithstanding they are less frequent in some branches of it, on account of the existence of rules which are *uniform* in many countries. The field of commercial intercourse is extraordinarily extensive, especially in matters of banking and exchange; here we have practically no territorial limits. Diena ("*Trattato*," i, p. 8), though noting many rules of commerce which are the same throughout the world, nevertheless arrives at the conclusion that a separate study of the conflicts of commercial laws is of practical importance.

II. International Commercial Law requires separate treatment

notwithstanding the fact that in some jurisdictions (*e.g.* England, America, Switzerland) the laws of commerce do not constitute a distinct branch of jurisprudence. It may be said, however, that even in international matters, commercial problems are often determined by the ordinary principles of Civil Law. Nevertheless, a number of divergences require our attention.

III. So far as no special mention is made of commercial relationships, our treatment here must be considered as supplemented by what has been said under International Civil Law.

The Japanese Code of Commerce (in force since 1899) says under the heading, "The Application of the Act":—

"In commercial matters, so far as this act contains no special provision, the customary law of commerce shall apply, and in the absence of any such customary law, the Civil Code shall be applicable."

A general rule of conflict might be formulated in similar terms.

IV. Commercial usages are of considerable importance in determining international relations. In general, it may be said that conflicts among these usages are to be treated in the same manner as conflicts of laws (Lyon-Caen and Renault, i, No. 81).

That which is customary, or to be regarded as corresponding to usual practice, has the same effect as though willed by the parties. Thus, rules in use upon a bourse or exchange have the effect of *lex contractus*. This applies also in the International Law of Commerce. As an example we cite the customary trade allowances and conditions of payment in London for various East India and colonial produce.

Furthermore, wherever commercial laws provide a reservation in favor of local customs or commercial customary law, the same reservation applies to *foreign* customs where there is an international element in the case. This applies, for instance, to the German Code of Commerce in §§ 90, 95, and 568. Customary rules must be observed and applied, even though the internal law does not otherwise recognize them, provided that the issue in question is governed by a foreign system of law which *does* recognize them. On the other hand, when an issue is governed by foreign commercial law, it does not follow that the internal commercial law loses *all* influence over it. What this influence is, must be

determined in each separate case. It is particularly necessary to learn whether the internal state intends its law to be *coercive*.

Commercial legal provisions apply also to the state as an entity, wherever it is engaged in business of a private legal nature, and not expressly excepted by statute. Reference is to be made to :—

1. Art. 7, Italian *Codice di Commercio* ;
2. the German Code of Commerce.

(a) Art. 452 provides :—

“The provisions of this title are not applicable to the forwarding of property through the postal administration of the Empire or of the Federal States. Such administrations are not to be regarded as merchants within the meaning of this act.”

(b) Neither is the Bank of the Empire (with its branches) to be regarded as a merchant.

V. Efforts have been made in certain branches of the Law of Commerce to establish internationally uniform rules. Refer for example to :—

1. Charles de Touzé, “*D'un projet de code de commerce international*,” *Journal des Economistes*, 1868, pp. 207, 215.
2. De Parieu, “*Réponse*,” *id.*, pp. 216–220.
3. Pradier-Fodéré, “*Traité de droit international public européen et américain*,” iv, p. 293. This author recommends a unification of the law of commercial stock companies.

Important treaties have been concluded in regard to :—

- (a) railroad and postal law,
- (b) industrial property (patents, trademarks, etc.),
- (c) copyright law.

The tendency existing in Germany to purify words which are accepted everywhere as general international designations of the same idea is in direct opposition to these valuable efforts toward unification. This is to be deeply regretted, as a cosmic intercourse of reason and intellect is thus prevented. I have frequently opposed this tendency (which also evinces itself in Swiss legislation). Variations of terms which are internationally of the same or similar significance, especially those of the Law of Commerce and of the Law of Bills, are wholly purposeless. Words of foreign origin ought not to be done away with where, through long usage, they have

acquired a kind of citizenship and have become the veritable currency of speech.

Lönnholm seems to be an enthusiast in this matter of purism. In his German translation of the Japanese Code of Commerce he speaks of an "*Annahmeablehnungsurkunde*," of an "*Ablehnungsurkunde*," of a "*Verlängerungszettel*," etc. I consider such juristic purism as wholly unsuitable, although naturally not interfering with the merit of the translation. It would seem that such a tendency should be least expected in one who is largely engaged himself in matters of international intercourse.

Finally, it is to be noticed that in many commercial transactions the question as to which objective system of law is applicable does not play *as great* a rôle as it does in civil law, for the reason that universal or cosmic views dominate a whole series of relationships in international intercourse.

In America and England

It has been said that "the mercantile law of England is, in point of fact, an edifice erected by the merchant, with comparatively little assistance either from the courts or the legislature. The former have, in very many instances, only impressed with a judicial sanction, or deduced proper and reasonable consequences from those regulations, which the experience of the trader, whether borrowing from foreigners or inventing himself, had already adopted as the most convenient" (Smith's "*Mercantile Law*," 9th ed., p. 12). Thus it is that, with the exception of the Law of Bills and Maritime Law, there is no *special* body of laws in these jurisdictions applicable to merchants or commercial transactions. In this our law differs essentially from that of most countries of the Continent of Europe in that there, commercial codes have been enacted containing rules frequently differing from the ordinary rules of law, and which, so far as their provisions reach, are applicable (*a*) in transactions between merchants, (*b*) between merchants and non-merchants, (*c*) between parties who have been formally registered in the governmental commercial register. It is also necessary to add that there are special courts having exclusive jurisdiction in commercial matters and a special form of procedure.

It follows that in America and England there are no special rules of conflict applicable *exclusively* to commercial transactions or

to transactions between merchants, as the general rules of conflict apply to all classes of persons.

§ 161. Rules of Conflict in Commercial Law.

I. *Express provisions.*

1. In Germany neither the old nor the new Code of Commerce contains exhaustive and express rules of conflict. Only §§ 13 and 201 are in point.

Art. 2 of the Introductory Act to the Code of Commerce provides:—

“In commercial matters the provisions of the Civil Code are applicable where there are no other provisions in the Code of Commerce or in this act.”

Accordingly it may be concluded that in general the rules of conflict enacted in the Introductory Act to the Civil Code are effectual also in commercial relationships.

2. The Italian *Codice di Commercio* (in force since January 1, 1883) contains a rule of conflict in Art. 58 (see translation *infra*, § 162, II, 4; Diena, “*Trattato*,” i, pp. 27 *et seq.*, 73 *et seq.*, 138).

3. The Portuguese Code of Commerce contains rules in Arts. 4, 6, 12, 55, 109, 112. They are published in German in *Zeitschrift für internat. Privat- und Strafrecht*, i, pp. 544 and 637, and in O. Borchardt's “*Handelsgesetze des Erdballs*.” (See also Lehr's French translation of the Portuguese Code (Paris, 1889), and his articles in *Journal*, xv, p. 352; also E. Rolin in the *Revue de dr. i.*, xx, pp. 188 *et seq.*)

4. As the commercial law of Switzerland is amalgamated with its civil law, there are no separate provisions, and therefore no separate rules of conflict. So far as the Code of Obligations extends, cantonal rules upon commercial matters are, of course, superseded. Rules of conflict are contained in Arts. 97, 208, 512, 516, and 865 of the Code of Obligations.

II. *Rules of conflict have been frequently established by the practice of the courts, in the absence of statutory provision.*

III. *Official attempts at codification.*

In this regard, refer again to the draft treaties of the South and Central American republics. The treaty on Commercial Law is printed in English in the Reports of the International American Conference (p. 895).

The regulations of these questions should be undertaken by international conferences similar to those which have considered International Civil Law. The conferences held thus far at The Hague have not entered the field of International Commercial Law.

IV. *Private attempts at codification.*

1. Dudley Field, "Outlines of an International Code." In this work Commercial Law is not treated separately, but there are certain provisions (Arts. 539-702) upon International Private Law which refer particularly to this topic.

2. A. de Domin-Petrushevecz, "*Précis d'un code du droit international*" (Arts. 176-218).

§ 162. Capacity to act of Merchants (*qua singuli*).

Preliminary Remark.—The capacity to have rights always depends upon the law of that state in which the capacity is asserted (see § 57, *supra*).

I. *Some systems of legislation make capacity to act depend upon the personal statute of the obligor.*

1. Under some systems this will be the *lex patriæ*. Thus:—

(a) The *Portuguese* Code of Commerce provides in Art. 4:—

"The commercial capacity of Portuguese entering into trade obligations abroad, and that of aliens entering into such obligations upon Portuguese territory, is to be determined by the law of the country of each, provided in the latter case that it shall not be offensive to Portuguese public law."

— (b) The *French* Civil Code in Art. 3 makes the French law applicable to the status and capacity of French persons even when resident abroad (see also § 58, *supra*).

2. Under other systems we have seen that the status is governed by domiciliary law.

II. *Some systems of law treat the status in respect of commercial transactions territorially, i.e. according to the lex loci contractus.*

In this category belong the following countries:—

1. *Germany.*—We have seen (§ 58, *supra*) that Arts. 7 and 27 of the Introductory Act to the Civil Code apply particularly in the domain of commercial transactions. An analogous rule of conflict is presented for the Law of Bills in Art. 84 of the German Statute of Bills.

2. *Switzerland.*—Here, too, Art. 10, Fed. Stat. Pers. Cap., applies with particular force to commercial matters (see § 58,

supra). There is no special rule regulating the commercial capacity of Swiss subjects abroad, the provisions cited applying only to aliens in Switzerland. However, Art. 28, *N. & A.*, makes such Swiss citizens subject to the *lex patriæ*, unless the foreign law is applicable by its own terms. Capacity in regard to bills is specially regulated in the Code of Obligations (see Law of Bills, *infra*).

3. *England and America.*—Capacity to act (in commercial matters included) is governed by the *lex loci contractus*. This is in harmony with the whole tendency of the system of International Private Law prevailing in those Jurisdictions.

4. *Italy.*—Art. 58 of the *Codice di commercio* provides:—

“The form and the essential requisites of commercial obligations, as well as the form of transactions entered into for the purpose of the exercise, protection, or execution of rights arising out of the same, are governed respectively by the laws or usages of the place at which the said transactions and obligations were concluded, and at which the said transactions were entered into or executed; reserving however the exception mentioned in Art. 9 of the Preliminary Dispositions of the Civil Code, relating to those persons who are subject to their own national law.”

In other words, Art. 6, *Disposizioni* (§ 58, *supra*), does not apply to Commercial Law. The term “essential requisites of commercial obligations” embraces all the requisites mentioned in Art. 1104, *Codice civile*. There it is said, “*i requisiti essenziali per la validità di un contratto sono: la capacità di contrattare. . .*” Diena maintains (“*Trattato*,” i, pp. 138 *et seq.*) that the intention of the Italian legislature was to make an absolute provision for *commercial contracts* corresponding to Art. 84 of the German Statute of Bills (see § 184, *infra*). The voluntary submission to the *lex patriæ*, which is presumed when two subjects of the same foreign state enter into an obligation, has, of course, no influence upon the question of capacity to act. Diena admits, however, that his interpretation of Art. 58 has met with opposition. During the régime or the former Code of Commerce jurists were of the opinion that the *Disposizioni*, particularly Art. 6, applied both to civil *and* to commercial matters (*e.g.* see Esperson in *Journal*, vii, p. 257). Even to-day the view is supported that Art. 58 of the new code (in force since 1883) refers only to the material validity of obligations, and not to the subjective question of capacity. It seems to me difficult

to introduce this distinction into Art. 58, although it is true that without it, the provision is rather startling as coming from the land of the Italian School (see § 58, I, *supra*).

III. *A separate standard determines the capacity of tradeswomen.*

A woman conducting a business or trade is considered everywhere as having capacity to act within her occupation. She is therefore not permitted to take advantage of the usual defences of a married woman. Art. 12 of the Portuguese Commercial Code even states this expressly, viz. :—

“A foreign tradeswoman may not rely upon legal defences accorded to her on account of sex by the law of her nationality.”

Under most systems, a woman requires the authorization of her husband to carry on a business. In international relations, too, this authorization should not be revocable at an unreasonable time. A tradeswoman may, doubtless, rely for protection upon the domiciliary courts, especially where the marriage relationship has been interrupted by an action for divorce, where the husband is absent, or where he fails in the duty of support (compare French *Code civ.*, Art. 220).

A tradeswoman may acquire a domicile separate from that of her husband (see Lyon-Caen and Renault, i, No. 256; also *supra*, § 63, IV).

IV. *Suggestions for legislation* are presented by von Bar's resolution before the Institute of International Law and the conclusions of the Institute itself (see § 64, II, *supra*), in both of which a mollification of the principle of *lex patriæ* is recommended in commercial matters.

§ 163. The Legal Position of Foreign Merchants Generally.

I. *Pursuant to modern principles, aliens may pursue trade and industry in the inland and have the right to the same means of legal protection as natives.*

1. Certain systems of legislation have enacted this principle into their commercial codes once and for all, *e.g.*:—

(a) the *Spanish* Commercial Code, Art. 15 :—

“Aliens and foreign corporations may carry on business in Spain under observance of their own commercial laws in regard

to such matters as refer to their capacity to contract, and under observance of the provisions of this code as to such matters as refer to their establishments within Spanish territory, their business enterprises, and the jurisdiction of the courts of the nation."

(b) the *Portuguese Commercial Code*, Arts. 109 and 112.

2. The equality of aliens with natives in trade and industry is sometimes made dependent upon an express assurance by treaty that domestic subjects shall receive the same privileges in the foreign state. Thus, the Swiss Statute of 1892 upon License Taxes for Commercial Travellers (*N. F.*, xiii, p. 43) provides that every commercial traveller for a foreign house, seeking orders in Switzerland, shall obtain a license card, which may be obtained *gratis* if there be an agreement to this effect with the country in which the business house is situated, but which is taxed at 500 fr. *per annum* in the absence of such agreement.

3. Some treaties provide not only that the alien shall be treated upon an equality with the native in matters of private law, but also that he may engage in trade in a like manner. On the other hand, though this be the general rule, some treaties make exceptions in regard to certain branches of trade or commerce. Thus, treaties entered into by Austro-Hungary usually except the trade of apothecary from the application of the rule. In Germany the rule is made to depend largely upon reciprocity. See Statute of 1896 for the Prevention of Unfair Competition (*zur Bekämpfung des unlautern Wettbewerbs*).

II. *Domestic provisions of a public or economic nature are applicable to the conduct of the business of foreign merchants who have settled in the internal state.*

The provisions of internal law applicable to foreign commercial entities must be determined in each case separately, either from the express rules of conflict (*e.g.* prohibitive statutes), or from the spirit of the law of conflict prevailing generally in the particular state. The rules which are usually considered applicable to all classes of persons and commercial entities are those having the following objects:—

1. enforcement of publicity ;
2. enforcement of organization for the purpose of trade ;
3. orderly conduct of business, such as by the keeping of books of account, taking inventory, and making balances ;

Rules of this nature are contained in :—

- (a) §§ 40 (see *infra*) and 260 of the German Code of Commerce ;
- (b) Art. v, Austrian Regulations of 1865, relating to foreign stock companies ;
- (c) § 214 of the Hungarian Code of Commerce ;
- (d) Art. 246, No. 3 of the Roumanian Code of Commerce ;
- (e) Arts. 655, 656, 877 of the Swiss Code of Obligations.

As to the language in which books of account shall be kept, the German Code (§ 43) provides that the merchant shall employ a modern language and the script characters of the same. The Commercial Codes of Chile (Art. 26) and Honduras (Art. 26) provide that the books may be kept either in Spanish or in any other language. The Commercial Codes of Bolivia (Art. 42), Guatemala (Art. 34), Costa Rica (Art. 54), and Venezuela (Art. 31) require the use of the Spanish language exclusively (see Borchardt).

It would seem clear that for practical reasons a foreign language should be permitted in the case of foreign corporations. Lyon-Caen and Renault (ii, p. 285), although demanding the use of the French language in the first instance, add (p. 264) :—

“It would be impossible to claim, in the absence of a prohibitive provision, that books kept in France by an alien, in his own language, would be proof sufficient to declare the alien guilty of an act of bankruptcy because he did not keep books regularly.”

- 4. registration and publication, including matters relating to the powers and jurisdiction of a judge or other officer of registry ;
- 5. penalties of a criminal or private nature incidental to these duties (e.g. Arts. 860, 864, 875, Swiss Code of Obligation.)

The German Commercial Code provides :—

“§ 40. The account is to be made up in the currency of the Empire.

“In drawing up the inventory and account, all articles of property and debts are to be appraised at the value to be ascribed to them during the period for which the appraisal is made.

“Doubtful claims are to be appraised at their probable value, uncollectible ones to be written off.”

“§ 265. After ratification by the general meeting (of shareholders) the account, together with the profit and loss account, shall be published forthwith by the board of directors in the corporation journals.

"The notice, together with the information mentioned at § 260 and the remarks of the board, shall be delivered to the trade register. It need not be delivered to the trade register of a branch office."

§ 164. Capacity to act of Business Entities.

Preliminary Remark.—The capacity to have rights always depends upon the law of that state in which such capacity is actually asserted.

I. *It is the personal statute of the entity which is authoritative.*

By this is meant:—

1. the law prevailing at the business domicile of joint associations and partnerships;
2. the law prevailing at the seat (place of creation) of stock companies.

In dealing with commercial entities and their branch offices, we cannot speak of domiciliary law in its ordinary sense. It is the seat of the entity which corresponds to the domicile of the individual. The principle above stated, though generally recognized, is not to be found in positive law. In practice, commercial entities (business and stock corporations, partnerships, societies) having capacity to act and to enter into commercial transactions according to the law of their seat, have similar capacity in foreign countries.

II. *In speaking of the national law of business corporations, the law of that country is designated in which it has its seat, i.e. of the place of creation.*

Thaller (*Annales de dr. c.*, iv, p. 257) speaks of "*nationalité des sociétés par actions*," while the Institute of International Law speaks of the "*loi de pays d'origine*" (*Annuaire*, 1888, p. 154).

The International Congress of Stock Companies which met in Paris in 1890 set up the following propositions:—

"Every company has a nationality.

"The nationality of a stock company shall be determined by the law of the place where it is created, and where it has established its seat of business.

"The seat of business of a stock company can only be in the country where it has been created."

A foreign company or juristic person (stock company, partnership, society) should be recognized even though not corresponding in all respects with the internal law. This view has been frequently

expressed by the authorities (*e.g.* see Phillimore, iv, § 202; Dudley Field, Art. 545; and Laurent, iv, No. 72).

III. *Upon principle, foreign juristic persons are to be considered on an equality with those of the internal law.*

Of course this principle has been neither generally nor unconditionally followed in practice. Where the internal state adopts provisions relating to a certain branch of commerce, it is clear that foreign juristic persons pursuing this branch will also be affected. Properly, however, the rules of control should not be more strict than those against the domestic organizations and on no account vexatious.

In America and England

It must be remembered that the law of most Continental countries ascribes juristic personality or legal entity to a number of commercial organizations to which the law of America and England gives no recognition apart from the members composing them. Into this category belong partnerships, limited partnerships, and unincorporated societies.

As we have seen (Supplement to § 66, *supra*) these Jurisdictions will recognize the status of an organization to which the fiction of personality has been ascribed by a foreign state, by virtue of the principle of comity, and therefore, where no similar institution exists within the local state, the powers ascribed to it will not be given extra-territorial effect. Neither will the restrictions upon the business capacity of its members imposed at the place of its seat be given extra-territorial effect. Thus, a partner who holds himself out as such and contracts debts in a foreign country is liable for such debts by the law of such country, even though by the law of his own country where the partnership has its seat, he has but a limited interest in the firm and is liable only to such amount (*Barrows v. Downs*, 9 R.I. 446; *Carroll v. Waters*, 9 Mart. 500). Statutes limiting liability of joint stock companies have been held not to operate extra-territorially (*Taft v. Ward*, 106 Mass. 518).

On the other hand, where the limitations of a foreign partnership are based on a policy similar to that which obtains at the place of contract, they will be given effect by the courts of the latter place (*King v. Sarria*, 69 N.Y. 25).

As to the status of foreign corporations see Supplement to

§ 66, *supra*. Foreign corporations are practically upon an equality so far as their right to do business in the local state is concerned, though restrictions are usually to be found with reference to banking and insurance companies, and a number of States of the Union have set up, as a condition precedent to doing business within their limits, the compliance with certain rules, for the most part formal.

§ 165. Attitude of Domestic Law to Foreign Corporations.

Lyon-Caen, *De la condition légale des sociétés étrangères* (1870).

Pineau, *Les sociétés commerciales en droit international privé* (Bordeaux, 1893).

Walker, *Die rechtliche Stellung ausländischer juristischer Personen, insbesondere ausländischer Aktiengesellschaften* (Vienna, 1897).

Lyon-Caen and Renault, *Traité de droit commercial*, ii, Nos. 1092 *et seq.*

Sacoupulo, *Les personnes morales en droit international privé* (Geneva, 1898).

Denzler, *Die Stellung der Filiale im internen und internationalen Privatrechte* (Zurich, 1902), p. 346.

I. *The recognition of foreign commercial organizations, or more particularly stock corporations, in the internal state is frequently assured by treaty.*

The commercial treaty of 1894 between Germany and Russia contains the following provision (Art. 4):—

"Stock corporations and other commercial, industrial, and financial organizations which have been created in either of the two countries according to the existing laws and having their domicile therein, shall be recognized in the other country as having legal existence, and shall have the right to conduct a suit either as plaintiff or defendant therein."

Virtually the same relationship exists between Germany and Greece (1884) and between Germany and Servia (1892) by reason of the use of the most-favored-nation clause.

Similar provisions are contained in treaties between other countries, but it is unnecessary to cite them here in detail.

II. *Treaty provisions placing alien and native natural persons upon an equality do not prevent the law-making power from setting up limitations against foreign commercial entities, for reasons of a police or industrial nature.*

This applies generally between all states. It was expressly so held with regard to Art. 1 of the treaty of 1855 between England and Switzerland (*Journal de dr. i.*, xvii, p. 518).

III. *Special rules are observed in regard to stock companies.*

1. Besides the Hungarian Code of Commerce (§§ 210-230), the following provision of the German Code of Commerce is in point (§ 201):—

“If the seat of the organization is in a foreign country, and the nature of the business requires governmental approval in order to conduct business in the inland, its existence as a stock company must be proved at the time of notification” (for registry).

That which a statute provides in regard to ordinary stock applies also to preferred stock. A system permitting corporations to be organized with preferred stock is to be found in England, America, Germany, Belgium, Italy, and Switzerland; it is less customary in France, although the tendency there, too, is toward statutory recognition (see *Annales de droit commercial*, xiv, pp. 352-358). The system originated in England (Meili, “*Die Lehre der Prioritätsactien*”).

2. Besides provisions of a public nature affecting foreign corporations, the rules of the various exchanges must be observed whenever a traffic in securities is intended to be maintained.

The quoting of foreign shares, for example, on the French bourse is made dependent upon the decision of the *chambres syndicales d'agents de change*. They cannot be quoted unless one-quarter has been paid in, and the nominal value be not less than that permitted by French law to domestic companies (100 or 500 francs). See Lyon-Caen in *Journal*, xii, p. 269.

3. The International Congress of Stock Companies proposed the following resolutions:—

“XXII. *Les questions relatives à la constitution d'une société, à son fonctionnement et à la responsabilité de ses organes doivent être résolues d'après la loi nationale de cette société.*

“*Les règles sur l'émission d'actions ou d'obligations doivent s'appliquer dans un pays quelle que soit la nationalité de la société qui fait appel au public.*

“*Le même principe doit être admis en ce qui concerne la négociation publique.*

“XXIII. *Une société par actions régulièrement constituée dans un pays doit pouvoir contracter et agir en justice et faire des opérations dans les autres pays sans être astreinte à observer des conditions particulières.*

“XXIV. *Des formalités de publicité doivent être remplies par les sociétés étrangères qui veulent établir des agences ou succursales dans*

un pays. Les personnes préposées à la gestion de ces agences ou succursales doivent être soumises à la même responsabilité envers les tiers que si elles gèraient une société du pays.

"XXV. Dans le cas où les conditions seraient exigées d'une société étrangère pour être admise à contracter et à agir en justice dans un pays, l'inobservation de ces conditions ne devrait pas entraîner la nullité des opérations.

"XXVI. Là où des sociétés sont, à raison de la nature de leurs opérations, soumises à un régime spécial, il serait naturel de soumettre à ce régime les agences ou succursales des sociétés étrangères, sous les mêmes sanctions que celles qui sont applicables aux sociétés du pays."

4. See also Lyon-Caen and Renault, "*Traité de droit commercial*," ii, No. 117; Lehmann, "*Das Recht der Actiengesellschaften*," i, § 10, a.

IV. *Certain kinds of organizations are frequently subjected to a separate régime.*

This applies to:—

1. Insurance companies.

(a) Prussia is very loath to recognize foreign life insurance companies. The treaties are regularly interpreted to refer to natural persons only. The Imperial Statute of May 12, 1901, regulates private insurance undertakings (see particularly §§ 85 *et seq.*).

(b) The Swiss Federal Statute of 1885, upon control over private insurance undertakings, provides (Art. 3) that foreign companies must give proof that they are able to acquire rights and enter into obligations in their own name at their seat; must give notice of a principal domicile in Switzerland and appoint a general attorney; designate a domicile in each canton in which they do business; deposit a security to be fixed by the federal council. Actions for claims growing out of fire insurance may be brought at the place where the fire occurred.

2. Railroad companies.

3. Emigration companies.

In this connection reference is to be made to the German Statute of 1897 relative to Emigration (especially § 4) and to the Swiss Statute of 1888 (*N. F.*, x, p. 652). A special governmental control is created by these acts. Reference is also to be made to the following conclusions of the Institute of International Law:—

(a) *Principes en vue d'un projet de convention* (*Annuaire*, xvi, 1897, pp. 262-264).

(b) *Voeux relatifs à la matière de l'émigration adoptés, etc. (Annuaire, xvi, 1897, pp. 296-297).*

V. *The internal law should recognize business organizations properly existing according to the law of their personal statute, even though their type is not contained in the law or practice of the local state.*

The following are examples:—

1. Companies of limited liability as existing in Germany pursuant to the act of 1892. This type is unknown in many other Continental countries.

2. Foundations in the form of a trust as peculiar to English law.

On the other hand, provisions of the internal law of a *public* nature must be observed, as we have already stated. Art. 230, sub. 3, of the Italian Code of Commerce, reads as follows:—

"Si le società estere sono di specie diversa da quelle indicate nell'art. 76, si devono adempiere le formalità prescritte per il deposito e la pubblicazione dell'atto costitutivo e dello statuto delle società anonime, e i loro amministratori hanno verso i terzi la responsabilità stabilita per gli amministratori di queste."

If foreign companies are of a different type than those mentioned in Art. 76, they must fulfil the formalities prescribed in respect of the registry and publication of the act of organization and by-laws of the company; their administrators shall have the same liability toward third parties as are prescribed for administrators of the companies mentioned.

VI. References.

Detailed information upon the actual state of the law in the following countries may be obtained from the authorities cited below:—

FRANCE

Vavasseur, "*Des sociétés constituées à l'étranger et fonctionnant en France*," *Journal de dr. i.*, 1875, p. 345.

Buchère, "*Des actions judiciaires exercées en France par les sociétés anonymes étrangères*," *Journal de dr. i.*, 1882, p. 37.

Lyon-Caen, "*Des divers systèmes législatifs concernant la condition légale des sociétés étrangères par actions et des réformes à apporter à la législation française*," *Journal de dr. i.*, 1885, xii, p. 265.

Moutier, "*Du droit pour les sociétés commerciales étrangères d'ester en justice en France*," *Journal de dr. i.*, 1894, p. 954.

L. Drouin, *De la condition juridique des sociétés commerciale étrangères en France* (Paris, 1898).

GERMANY

- Wolff, "*De la condition des sociétés étrangères en Allemagne*," *Journal de dr. i.*, 1886, pp. 134, 272, 641.
 Kauffmann, "*De la condition juridique des sociétés anonymes françaises en Alsace-Lorraine*," *Journal de dr. i.*, 1882, pp. 129, 260; 1883, p. 605.

BELGIUM

- Guillery, "*De la condition légale des sociétés étrangères en Belgique*," *Journal de dr. i.*, 1883, p. 225.

HOLLAND

- Molengraaff, "*De la condition des sociétés étrangères dans les Pays-Bas*," *Journal de dr. i.*, 1888, p. 619.

ITALY

- Lefèvre, "*De la condition des sociétés étrangères en Italie*," *Journal de dr. i.*, 1884, p. 234.
 Danieli, "*De la condition des sociétés étrangères en Italie*," *Journal de dr. i.*, 1888, pp. 17, 330.

DENMARK

- Hindenburg, "*De la situation légale des sociétés étrangères*," *Journal de dr. i.*, 1884, p. 35.

ENGLAND

- Foote, "*De la condition légale des sociétés étrangères en Angleterre*," *Journal de dr. i.*, 1882, p. 465.

RUSSIA

- Barkowski, "*De la condition des sociétés étrangères en Russie*," *Journal de dr. i.*, 1891, p. 712.

ROUMANIA

- "*De la condition légale des sociétés étrangères en Roumanie*," *Journal de dr. i.*, 1889, xxvi, p. 977.

GREECE

- Euclidès, "*De la condition légale des sociétés étrangères*," *Journal de dr. i.*, 1889, p. 59.
 v. Streit, "*Die Rechtsstellung der auswärtigen Aktiengesellschaften in Griechenland*," *Zeitschrift für internat. Privat- und Strafrecht*, vi, pp. 193, 314.

§ 166. Branch Establishments.

I. *The substantive requisites for the existence of a branch establishment within the meaning of the statutes is governed by the personal statute of the principal, i.e. as a rule, the domiciliary law.*

1. A branch establishment (German = *Zweigniederlassung*; French = *succursale*) is one which is located at a different place from that of its principal, and which permanently conducts business of a like order. Its connection with the principal business

lies in the economic relations between them, but it is necessary that to a certain extent its function and sphere of activity be independent. As the conception has been developed on the Continent of Europe, a function of a merely technical nature (*e.g.* with reference to a factory) will not serve to create a branch establishment within the meaning of the laws. It is immaterial that it have power to purchase goods, if this be merely incidental to the conduct or execution of the principal business.

Thus none of the following will fall within the meaning of the term "branch establishment."

- (a) Agencies, as of insurance companies. These are merely intermediaries for introducing business, while the transaction itself is closed at the seat of the company (*A. E.*, xviii, p. 21). However, a *general* agency of an insurance company comes within the meaning of § 21, German Rules of Civil Procedure.
- (b) Places for storage.
- (c) Salesrooms or warehouses for consignment.
- (d) Austrian merchants usually have "branches" in Vienna. Large modern industrial establishments have special "*bureaux*." English and American concerns have their "representatives." In all of these cases a legal independence in dealing with the public is, as a rule, lacking.
- (e) Railroad stations; these are simply part of the whole apparatus, and do not execute transportation contracts, though they may conclude them.
- (f) Manufacturing agencies for giving out raw material to workmen (*e.g.* weavers of silk), to be received back manufactured, and forwarded to the main office. Such an agency is merely an intermediary (*A. E.*, xxv, pt. 1, p. 415).
- (g) Emigration agencies of shipping and railroad companies.

2. The principle as above stated is recognized by the following statutes:—

- (a) Portuguese Commercial Code, Art. 55, provides:—
 "Foreign commercial companies desiring to establish a branch office in Portugal must present to the commercial registry a certificate of the proper Portuguese consul, certifying that they have been created and are existing pursuant to the laws of their own country."
- (b) Spanish Commercial Code of 1885 contains a similar provision in Art. 21.

3. According to Swiss law (Art. 624, Code of Obligations) the duty of registering business firms in the commercial register is laid upon the branch manager. This can be done either by presenting a transcript of the registry made at the place of the principal business, or, if a commercial registry is not in force there, by obtaining the certificate of an official, to the effect that the firm has a legal existence at that place (Rules of the Federal Council of 1890, relating to the Commercial Register, Art. 22).

II. *Local law is authoritative, however, in a number of directions.*

1. A dissolution of the branch establishment may result from certain causes of a public nature fixed by local law. Thus:—

(a) § 32, in connection with § 13 of the German Commercial Code and § 141, Imp. Stat. of 1896, upon Matters of Voluntary Jurisdiction, provides for dissolution in the event of the bankruptcy of the principal establishment. § 13 provides that registry shall be made in each district in which a branch is located, in the same manner as in that of the main establishment. This is expressly made applicable to establishments having their principal seat in a foreign country, unless the foreign law makes a modification necessary. The exception here in view is in the event of the foreign law making obligatory the registry of certain facts not required by the law of the branch business (*e.g.* Art. 230 of the Italian Commercial Code).

(b) Art. 28 of the regulations of the Swiss Federal Council, above cited, provide for the dissolution of the branch when the principal business has ceased to exist.

2. The internal law applies also in regard to:—

- (a) the formal requisites for the creation of a branch;
- (b) the use of the firm name;
- (c) registration and publications (§§ 13 and 201, German Comm. Code); if the law of the principal establishment does not contain the system of commercial registry, proof of its legal existence must be given in some other manner, *e.g.* through the judicial or diplomatic officials;
- (d) industrial police regulations. Thus where the law prevailing at the branch requires a formal authorization to conduct the particular business, this must be obtained irrespective of the personal statute.

3. By § 211 of the Hungarian Commercial Code, all foreign corporations in Hungary are compelled:—

"to submit themselves to the internal laws and jurisdiction in all matters of dispute arising out of transactions concluded by their local representatives."

The Hungarian Code contains, in §§ 210-214, detailed provisions relating to "branches and agencies" (Borchardt, iii, p. 938).

4. The Japanese Commercial Code contains detailed provisions in regard to branches, under the title of "Foreign Commercial Entities" (Arts. 255-260).

(a) Art. 255 provides as follows:—

"If a foreign commercial entity establishes a branch in Japan, registry and publication thereof must be made in like manner as of an entity of the same or similar nature created in Japan.

"A foreign commercial entity establishing a branch must also designate a representative in Japan, and register his name and address at the time of registering the establishment of the branch.

"The provisions of Art. 62 apply correspondingly to the representative of a foreign commercial entity."

(b) Art. 62:—

"An associate with power of representation is entitled to undertake transactions in or out of court relating to the business of the organization."

§ 167. Protection of Firm Names.

Pasquale Fiore, "*De la protection du nom commercial d'après le droit international positif*," *Journal de dr. i.*, x, pp. 19-26.

I. *Just as in International Civil Law, so in Commercial Law, a name fixed by a person's civil status must be recognized everywhere. The firm or business name of foreign individual merchants and foreign business entities are to be recognized and protected as a legal right in international intercourse according to the standard of the personal statute.*

1. This attitude may be referred to the conception of the status, but it suffices merely to say that it is internationally the view of to-day, and is in accordance with the interests of commerce. It follows also:—

(a) that the firm name of foreign merchants must be recognized in the form permitted by the foreign law, even though not corresponding to the native law;

(b) that the name of a foreign company is to be recognized even though all or a part of it be in a foreign language (*société par actions*), or contains a designation peculiar to the foreign law (limited companies).

2. The protection accorded to business names and to trade-marks has often been interpreted in the light of a kind of privilege in favor of home industry. This would result in making the right depend less upon the one using the name, and more upon the territory in which it was used. The conception is, however, untenable.

3. A special sanction has been given to the right of business names by the treaty entered into between the principal nations of the world at the Paris International Convention of 1883 for the Protection of Industrial Property. Art. viii provides that:—

“a trade name shall be protected in all the countries of the Union without the necessity of registration, whether it forms part of a trade-mark or not.”

Other treaties, *e.g.* between Germany and Switzerland, 1894, regulating patent and trade-mark law, also deal with this question. The treaty mentioned makes the observance of local formalities necessary.

4. The business names of branch establishments are likewise to be recognized. Of course the addition of a supplementary term (*e.g.* the word “branch” or “*filiale*”) may be compelled for the sake of differentiation. In Germany, it has been said that the use of personal designations for stock companies is not permissible even for branch establishments, even though the law of the seat permits it (*Deutsche Jurist. Z.*, 1901, p. 137).

II. *Coercive provisions of the internal law are excepted from the above rule, especially those for the prevention of trade deceptions* (§§ 18, 20, 30, and 30, German Commercial Code; Arts. 868, 873, Swiss Code of Obligations).

1. In France the principle prevails that aliens are entitled only to “*droits naturels*”; only an alien who has been authorized by decree to establish his domicile in France, is permitted the enjoyment of all “*droits civils*” (Arts. 11 and 13, *Code civil*). The Court of Cassation, as late as 1870, held that, in the absence of such decree, an alien could not maintain an action for the usurpation of his firm name. The Act of 1873 makes the right of aliens to invoke French rules of law upon this point dependent upon whether reciprocity is assured either by statute or by treaty.

2. In Belgium, too, the early French doctrine prevails. The Court of Brussels held that the provisions of the penal code against “*usurpation de noms*” were enacted essentially to protect

national industry, and that foreigners having no permanent settlement or establishment in Belgium have no right to sue on account of usurpation. Pasquale Fiore (as cited, p. 21), on the other hand, informs us that the Court of Cassation applies the provisions of the Penal Code to everybody, without any distinction between natives and aliens.

3. In Germany, a judge of registry has held that the principle above laid down (I) must, according to Art. 22, Introductory Act of the Commercial Code, be subject to exception in the case of a foreign corporation using a *personal name* without showing that the proprietor of the business is a stock company. It must be taken that German law is absolutely opposed to purely personal designations for stock companies. The danger that the public will be deceived as to the real nature of the organization by a personal designation without a supplementary term, is just as great in the case of foreign as in the case of domestic corporations, and this danger must be obviated for all cases (*Deutsche Jurist. Z.*, 1901, p. 137).

III. *Under certain circumstances, a business or firm name may serve as a trade-mark. In such a case, the requisite for its protection abroad is that it should be recognized in the home state. The foreign protection is merely accessory. This is true also outside of the Industrial Union.*

Thus, a mark which cannot get protection in its own country is not protected abroad, and the fact of its being *registered* abroad makes no difference (see also von Bar, ii, p. 274). The home state of companies or other juristic persons is that wherein their principal business seat is located. It follows, then:—

1. That protection will not be accorded where the home state does not recognize an exclusive right, say for the reason that the name has become common property in the particular branch of manufacture. It was so held in Germany in respect to the name of "Liebig" as used by the Liebig Extract of Meat Co. (Imp. Ct., Civil Cases, xl, p. 63; xlv, p. 131).

2. The right of protection is lost if the use of the name as a trade-mark has been extended to another person by contract, and the transferee's right is not recognized in the home state, *e.g.*:—

- (a) either because such a contract is there held to be illegal;
- (b) or because it has thus become common property.

[The International Convention for the Protection of Industrial Property referred to in this paragraph was acceded to by Great Britain, March 17, 1884, and by the United States of America as of May 30, 1887.]

NOTE

Pasquale Fiore, *Journal de dr. i.*, x, p. 19, says, "*Le nom représente en fait la personne elle-même, c'est le résumé de tous les éléments qui composent son individualité, il est, par excellence, la propriété la plus certaine, la plus indiscutable, la plus légitime, la plus imprescriptible; c'est pour cela, qu'indépendamment de tout traité international, chaque puissance devrait appliquer ses lois particulières contre quiconque a usurpé le nom commercial d'autrui, sans faire aucune différence entre les nationaux et les étrangers.*"

At p. 23, he says: "*Résumant donc les principes touchant l'usurpation du nom commercial, nous croyons qu'il faut dire, que d'après la loi morale et la justice internationale, l'usurpation du nom doit être punie, ainsi que tout attentat aux droits de la personne et toute violation de la bonne foi publique, sans faire aucune distinction entre le régnicole et l'étranger, et sans subordonner l'admissibilité de l'action à l'existence de traités internationaux et au principe de réciprocité légale.*"

§ 168. Law applicable to Commercial Matters Generally.

I. *The primary distinction is here again between obligations on contract and obligations in tort.*

II. *There is no uniformity in legislation or practice between the various countries.*

1. The *lex loci contractus* is the standard most often relied upon in France, England, and Italy. As we have seen, Art. 58 of the *Codice di Commercio* gives it a legal basis in Italy, even for the determination of the status. However, Art. 58 is tempered somewhat by the final clause (see *infra*).

The Portuguese Commercial Code (Art. 4) provides that commercial transactions are governed:—

- (a) by the *lex loci contractus* in regard to the substance and effect of contracts, unless something to the contrary is agreed upon by the parties;
- (b) by the law of the place of performance in regard to the manner of execution;
- (c) by the place where the transaction is concluded, as to external formalities, unless the law expressly provides otherwise.

2. The national law must not be too strongly accentuated in commercial matters. Art. 58 of the Italian Code makes the *lex patriæ* presumptive where both parties belong to the same country, for this article refers directly to Art. 9, *Disposizioni*, by saying:—

"reserving, however, the exception mentioned in Art. 9 of the Preliminary Dispositions of the Civil Code, in regard to those persons who are subject to their own national law."

Exclusive of this rule, there should be most convincing grounds before the *lex patriæ* be applied in commercial matters.

3. The law of the place of performance is frequently applied to determine commercial contractual obligations.

III. *A contractual designation of the authoritative system of law is permissible, and is frequently made use of in practice.*

1. There are really no formal rules of conflict to be cited for this proposition; not even Art. 58 of the Italian Code expressly reserves the final clause of Art. 9, *Disposizioni*, by which the so-called autonomy of the parties is respected. However, the proposition refers generally to all questions not included in *jus cogens*, or coercive law. It has indeed been said that Art. 58 contains a positive legal provision, unalterable by contract, and that therefore Art. 9, *Disposizioni*, could never apply to commercial contracts except as provided in the case of two parties of the same nationality. This is untenable (Diena, "*Trattato*," i, pp. 75 *et seq.*). There is no sufficient ground for the legislature to specially exclude the right of autonomy in commercial matters. The *sostanza* of commercial obligations must be kept free to depend upon it, while *essential requisites* must be determined by the *lex loci contractus* (see § 162, *supra*).

2. Generally speaking, *jus* and *forum* must here also be kept separate; it will follow then that a contractual fixing of the forum will not of *itself* be equivalent to a voluntary submission to the corresponding system of law.

3. Both the forum *and* the authoritative system of commercial law are often fixed by contract.

(a) by a final clause submitting to a particular system of commercial law, exclusive of exchange usages.

(b) by the acceptance of conditions often set up by banking houses, that the usages of the bourse at a particular place shall be applicable to all transactions. Thus, some Swiss banking institutions request their customers to sign the following formula:—

"*Nous déclarons élire domicile à la Banque . . . à Bâle et nous soumettre encas de contestation à la jurisprudence des tribunaux du canton de Bâle-ville.*"

- (c) by reference to the conditions of a particular market, *e.g.* the Zurich rules for the trade in raw silk (*H. E.*, xix, p. 283).
- (d) by executing contracts for the sale of grain, containing conditions similar to the following : —

"Toute contestation pouvant s'élever au sujet de la présente affaire sera réglée par les soins du Bureau d'expertises des Céréales de Marseille suivant son règlement et en tant qu'il n' aura rien de contraire aux stipulations ci-dessus."

The application of the agreed system of substantive law applies to the issue even though litigated in a state where that system does not prevail. In other words, by waiving that part of the contract which relates to the forum, the party does not renounce the right to rely upon the contractual submission to an objective system of law.

§ 169. Commercial Sales.

Refer to : —

- 1. § 121, regarding ordinary (not commercial) contracts of sale ;
- 2. § 122, regarding sales at markets and fairs ;
- 3. § 170, regarding sales of bearer bonds ;
- 4. § 173, regarding sales of securities by banks, etc.

1. *In Continental Europe commercial contracts are regularly held to be subject to the objective law of the place of performance or the *lex loci contractus*.*

1. Contracts are frequently found in practice by which one of the parties is made the "representative" of a concern, *e.g.* in regard to the sale of a certain patented article, to the end that the representative upon his own account introduces the article to the trade. The contract then goes on to say that the representative is obligated to take a certain quantity of the goods in a given time. The legal relationship here created is not one of principal and factor, but rather a preliminary contract, fixing the conditions under which future sales are to be concluded.

2. The place for the examination of goods purchased is, upon principle, the point of destination (see *supra*, § 121). Wine shipped from Spain to London is subject to examination in London. However, contracts of sale frequently modify this rule. Especially is this done in the coal trade, where the place of mining is made the place of performance. Thus, conditions of sale of the coal syndicate of Liège contain the following clause : —

"Les charbons sont vendus mis à bord aux riviages ou chargés sur wagons aux fosses ou ils sont reçus et agréés par l'acheteur."

Similarly, the "General Conditions of Sale" at the coal mines of Mülheim-Ruhr state:—

"Die Waren sind auf der jeweiligen Versandstation zu empfangen."

3. The place of performance can also be agreed upon along with a clause designating the authoritative system of law. This is done by the Royal Mines of Saarbrücken, the conditions of sale providing that the place of performance, the objective system of law and the jurisdiction, shall all be deemed to be that of St. Johann-Saarbrücken. The syndicate of Liège sets up the following condition:—

"Toutes les affaires sont censées traitées au siège de la société et toute contestation qui surviendrait à l'occasion de l'interprétation ou de l'exécution du contrat sera portée devant les tribunaux de Liège, qui seront seuls compétents pour la juger."

4. Where the principle of the place of performance is accepted as the standard by law or by contract, the following questions will be determinable thereby:—

- (a) whether the seller has the right to sell the goods for his own protection (*A. E.*, xvi, p. 795);
- (b) the effect of delay in delivery.

II. *Certain questions, as, for instance, the liability for warranty, are often regulated by usages.*

Reference is to be made in this connection to the various usages in the grain, spirits, coffee and sugar, cotton, tobacco, and tea trades in the corresponding markets (Antwerp, London, Liverpool, Marseilles, Havre, Hamburg, etc.). These usages have been collected and arranged by various authors (*e.g.* Jürgens, "*Hamburgische Börsenhandbuch*," 6th ed., 1900). Attention should also be directed to the clause "*tel quel*" (see Boden, "*Z. für Handelsrecht*," *N. F.*, vol. 36, p. 339).

The following may be cited as practical examples of commercial usages:—

1. In the great cotton centres, Havre especially, the usage prevails that when once the goods have left port, claims may no longer

be made. "*La marchandise une fois enlevée, il n'y a plus lieu à réclamation.*"

2. According to the custom of Zurich in the raw silk trade, claims as to the quality of the goods must be made within three times twenty-four hours (Sundays and holidays excepted) from the time of receipt. At the end of this time no claims may be made even though the condition of the goods has changed. Such a usage is regarded equally as binding as though made by contractual agreement (*H. E.*, xix, p. 281).

3. In many instances a usage is to be found with regard to transoceanic sales of goods whereby a right for defects in quality is denied to the buyer. In certain cases the return of the goods is permitted, but only under special obligations placed upon the buyer. This has been recognized:—

(a) in the transoceanic cotton trade ;

(b) in sale of certain lines of American flour (*H. E.*, xviii, p. 80).

The London Corn Trade Association has a form of contract in which is contained the following clause:—

"Difference in quality shall not entitle the buyer to reject, except under the award of arbitrators or the committee of appeal, as the case may be."

III. *If we follow the view that the obligations of the contracting parties in bilateral transactions are determined each by their separate local systems, the respective domiciliary laws of buyer and seller will be here also applicable (see § 104, supra).*

§ 170. Bonds and Notes payable to Bearer.

G. Deloison, *Traité des valeurs mobilières françaises et étrangères* (1890).

Wahl, *Traité théorique et pratique des titres au porteur en France et l'étranger* (1891).

Lyon-Caen and Renault, ii, No. 597 *et seq.*

I. *Issue.*

1. Where a particular law requires governmental consent before the issue or circulation of bonds or notes payable to bearer, it is clear that the bearer will be unable to have recourse against the maker where this provision has not been observed (*Savigny, "Obligationn."*, ii, p. 126).

2. Governmental consent may be declared a requisite also as to

foreign issues, as, for instance, in France; but without an express provision, the application of the law should only be to local issues.

3. Bonds or notes payable to bearer receive their character as such from those local laws which give legal force to the expression of the will therein contained (German Imp. Ct., iv, p. 139). And when subjects of a state the laws of which require governmental consent issue such paper abroad, the effect of the act is a matter under the authority and control of the foreign state (German Sup. Ct. of Comm., xii, p. 302).

II. *The position of the debtor.*

The duties of the debtor under such strict unilateral obligations are referable upon principle to the *lex domicilii*, and in regard to companies, to the law of their seat. Of course, a foreign system of law may come into question where payment is to be made at a third place, or where, from other circumstances, it may be deduced as the debtor's will.

III. *Taking the paper out of circulation.*

By certain statutes, the bearer has the power of taking the paper out of circulation by noting it for himself, or by having it noted by some official. This process intensively affects the legal nature of the paper in regard to pledge and vindication. The systems of law which suggest themselves for application are:—

1. the law of the place of issue;
2. the law of the place of noting out of circulation;
3. the law of the place where the paper lies, *e.g.* where it is pledged.

The German Imperial Court (iv, p. 138) holds that the law of the place of issue is authoritative, not only as against the maker, but generally as to the validity of the noting. The argument is this: that the paper acquires its character from the intention of the person who issues it, *i.e.* from the local law which gives legal force to this intention. It follows, therefore, that the same local law must govern conditions under which its peculiar character shall continue or be destroyed.

IV. *Recirculation.*

Any noting by which the paper is again put into circulation is, as regards its form and effect, to be ruled by the law of the place where this noting took place. This again makes the paper negotiable, and whether such recirculation be or be not permissible, is referable to the place where the act occurs.

V. *The French Statute of June 15, 1872.*

This statute (*relative aux titres au porteur*) regulates the rights of those who have lost paper payable to bearer. The loser must give notice of his loss through the bailiff of the debtor bank; also of the number of the articles lost and other circumstances; this works as an opposition to the payment of the principal or interest by the bank, and is published in a particular newspaper. Every further transfer of the security is void as against the opposer. The law is not applicable to notes of the *Banque de France* or paper issued by the government. The extent to which these provisions should be recognized in international relations has been much debated. It has been claimed:—

1. that the law refers only to French paper;
2. that the law applies to foreign paper stolen and negotiated in France;
3. that the law is applicable also to French paper dealt with commercially by foreigners in a foreign country; the reason given is that it is a police regulation. To substantiate this view, Art. 3, *Code civil*, is referred to (*Journal de dr. i.*, xi, p. 75; xii, p. 450).

Clunet most vigorously opposes so extended an application of the statute (*Journal*, xii, p. 452), and it is unsound on principle. Transfers made out of France are governed by the foreign law, and if this law gives the transferee an unassailable right as against the dispossessed owner, this must be recognized also in France, or as against a French "owner." It is immaterial that, according to this theory, the statute is easily avoided, because the thief may take the paper abroad. This consequence is incidental to the easy negotiability of such paper.

§ 171. Sales of Bonds and Notes payable to Bearer.

I. *Upon principle, the law of the place of acquisition is authoritative.*

1. Under modern law, the *bona fide* purchaser of personal property or of paper payable to bearer is protected, even though the vendor was not the rightful owner; "*en fait de meubles possession vaut titre.*" There still exist differences between the laws of the different countries, *e.g.* between:—

- (a) the French law (*Code civ.*, Arts. 2279 and 2280; Arts. 205 and 206, Swiss Code of Obligations), and
- (b) the German law as expressed in the former Code of Commerce (Arts. 306 and 307) and in the present Civil Code, § 935.

2. Art. 208, No. 2, Swiss Code of Obligations, contains the following rule:—

“With the exception of the rule contained in the foregoing article (“a purchaser in bad faith must always surrender the object. . .”), the claim of ownership will not be recognized:—

1. in regard to bank-notes and matured coupons;
2. *in regard to negotiable paper payable to bearer, acquired for value and in good faith in countries where the action for ownership is not permitted.*”

This provision, which constitutes a rule of conflict, was established for reasons of international intercourse, and refers particularly to relations with countries such as Germany and Austria, by which the *bona fide* purchaser is protected in his title, viz. under the former German Code of Commerce and the present Civil Code. It follows that where a German banker acquires Swiss securities in Germany, stolen from a Swiss in Switzerland, the latter will be excluded from vindicating his title. It is the *lex loci contractus* which is applicable (*A. E.*, xxv, part 2, p. 844).

3. Where French securities have been stolen and are sold (or delivered in payment) in Berlin, the question as to whether vindication be permissible against the bearer is determinable by the German law (*lex loci contractus*).

II. *The law of the place where the security is purchased is applicable also as to the duty of giving a guaranty.*

Exchange usages become especially important here, usually in the form of an implied *lex contractus*.

1. If the security proves to be amortized, its delivery will not be considered a proper performance of the contract (Ger. Sup. Ct. of Comm., xi, p. 45; Dernburg, “*Preuss. Privatrecht*,” ii, § 143, notes 9–10).

2. If amortization has merely been *begun* at the time of sale, it is the business of the vendee to give timely notice of his right (Ger. Sup. Ct. of Comm., v, p. 234).

3. If the negotiability of the paper has been limited, the purchaser may claim that an essential characteristic has been lost (Ger. Sup. Ct. of Comm., xvi, p. 22).

4. Where French securities have been advertised in the *Bulletin officiel des oppositions* and are afterwards dealt with in Berlin, it is the German law which is applicable. The vendor must give guar-

anty for the deliverable nature of the instrument, and the mere fact that the vendee has cashed matured coupons is no waiver of his rights. The coupons are intended for that very purpose, and the nature or value of the security as such has not been affected.

In America and England

The rule in these Jurisdictions is substantially as stated by the author, *i.e.* the *lex loci contractus* is taken as authoritative. Thus where a warehouse receipt was issued in New York and transferred there to an Illinois corporation for an antecedent debt, it was held that the New York law would be authoritative upon the point whether the paper was negotiable, so as to shut out equities against the transferrer (*Bank v. Dean*, 16 N.Y. Supp. 107).

In England it has been held that certain Prussian bonds, though negotiable so as to pass from hand to hand in Prussia, would not be so regarded as to bar the original owner from claiming them from a *bona fide* holder upon the ground that they were stolen from him in England, unless the evidence showed that the custom of *English* traders was to regard them as negotiable (*Picker v. L. & C. B. Co.*, 1887, L. R. 18 Q. B. D. 515).

Again, in determining the validity of a transaction in share certificates of American railroads, the transaction having taken place in England, it was held that the holder's right to possession must be determined by English law. If, however, he were validly in possession by that law, the import of the right to possession, the character of his right and its extent, must be determined by the law of the document, *viz.* the American law (*Williams v. Colonial Bank*, 1888, L. R. 38 Ch. D. 388).

§ 172. Business at Exchanges.

The same principles apply here as to business transacted at markets or fairs.

1. The modern bourse or exchange is the highest type of the market; it has in fact taken over the function of the earlier market in many directions, and for this reason the law of markets as discussed under International Civil Law (§ 122, *supra*) is also applicable to business transacted at exchanges conducted for the sale of goods or securities. We must here indeed go one step farther in order to state that business done by correspondence (letter, telegram,

or telephone) with foreigners and executed on a local exchange, or by natives at a foreign exchange, is also subject to the law of the exchange. Instead of the physical meeting of the parties customary at the old markets, we have the simplification of intercourse and communication as developed in modern times. With this change of the situation, the law has kept pace. It is only by applying the law prevailing at the exchange to every one who takes part in its business, be he native or alien, that complete justice can be done; physical presence is not a legal requirement. Exchange business has attained enormous proportions, and is conducted at a distance as easily as at close range. Furthermore, the rapidity with which these transactions are closed does not permit of inquiry as to the law of the alien. The rule has thus developed that the law prevailing at an exchange applies to all business transacted there.

2. The standard is therefore the *lex loci contractus*, which embraces also the usages of the exchange. To the *lex contractus* are referable such questions as:—

- (a) the validity of the transaction;
- (b) the obligation to warrant;
- (c) the effect of delay.

The personal capacity to act is also governed by the *lex loci contractus* where the foreigner personally takes part in the transaction upon the exchange.

§ 173. Speculation in Differences.

Fusinato, *Dell' efficacia in Italia dei contratti di borsa stipulati all' estero* (Venice, 1891).

Wahl, "*Les jeux de bourse en droit international*," *Journal de dr. i.*, xxv, pp. 234-252.

Diena, "*De la validité des jeux de bourse dans les rapports internationaux*," *id.*, xxiii, pp. 65, 284.

Diena, "*Quelques mots encore sur les jeux de bourse en droit international*," *id.*, xxvi, p. 326.

I. *The view most widely accepted is that a rule of law which makes claims arising out of speculation in differences unactionable is absolute in character. It follows that unless the law of the defendant's domicile recognizes the action, no rights will accrue, even though such speculation does not offend the law at the place of the exchange.*

A case of speculation in differences is presented where it is agreed by the express or implied will of the parties that there shall be no right to demand or duty to deliver the goods or securities sold or purchased, so that the difference in quotations represents the sole object of the contract (*A. E.*, xii, p. 462; xvii, p. 144).

According to the law and practice of both Germany and Switzerland, the statutes making these transactions illegal are regarded as of a public nature and are applied to foreign as well as to local transactions (§ 68, German *Börsengesetz* of 1896; *A. E.*, xiii, p. 503).

The German statute of 1896 makes the validity of exchange business transacted with periodical settlements dependent upon the registry of the names of both contracting parties in a special exchange registry (see also *Imp. Ct.*, xliii, p. 92).

The plea that a transaction is a wagering contract is open to the surety for the principal debtor (*A. E.*, xviii, p. 283). It is also permitted as against the broker in his position as independent contractor (*A. E.*, xix, pp. 572, 824; *Deutsche Jurist. Z.*, 1901, p. 459).

II. *Even if claims arising from speculation in differences are rendered unactionable by legislation or practice, it does not follow that all transactions connected therewith are to be likewise so considered.*

1. Thus, it does not follow that because a purely speculative transaction be unactionable, that a contract of partnership for the purpose of such speculation be absolutely void; an action for the recovery of the proportional amount won or lost is maintainable. But an action for the payment of the capital promised to be advanced is not (*Ger. Imp. Ct.*, xviii, p. 152).

2. A compromise of the differences arising out of such speculation will be legally binding when preceded by a dispute as to the existence of a claim and its amount. But where the essential qualities of a compromise are lacking (P. Oertmann, "*Der Vergleich im gem. Civilrecht*," 1895, p. 17) the plea of wager will again be permissible (*A. E.*, xviii, p. 283).

3. The same may be said of the assumption of a debt by one to whom the wagering nature of the debt is unknown.

4. Where the novation or recognition of the debt takes place in a foreign country, the act may be legally binding, although the transactions themselves were not actionable under the law where

they were concluded, *e.g.* where a Swiss recognizes a speculative debt after moving to France.

5. Where a mortgage is given in advance to cover possible speculative losses, under the pretence of a loan, the transaction will be declared invalid (Ger. Imp. Ct., xxxiv, pp. 286, 289); although a *bona fide* third purchaser of the mortgage would surely have been protected (see Art. 513, Swiss Code of Oblig.).

III. *The French statute of 1885 which placed speculation in differences upon a legal foundation would seem preferable to the condition of the law as stated at I, supra.*

1. The following rules of international law would seem to be advisable:—

- (a) Speculations in differences shall be valid if so considered by the law in force at the exchange. This is the French rule if the business is done through an *agent de change* in contradistinction to a *coulisse*.
- (b) Where such speculation is forbidden at the exchange where the operations took place, but is allowed at the domicile of the speculator, it should be held unactionable (see *Journal*, xxi, p. 896, citing a decision of the German Imperial Court).

2. Properly speaking, certain persons should not be permitted to deal at exchanges. It is clear that business in differences is widely prevalent; it is not an exaggeration to presume that business done with periodical settlements is also largely speculative. In my opinion, all business *permitted* at exchanges should, upon principle, be deemed legal and actionable. It is really a postulate to the security of trade and credit that all business regularly transacted upon the floor of the exchange shall be deemed legal. To submit transactions in differences, validly executed in a foreign country, to the nullifying law of the debtor's domicile is, to my mind, encouraging immorality. A clever speculator, in view of the condition of the law, might give two divergent orders at different places, accept the favorable result, and plead a wager against the unfavorable one. Furthermore, it is preposterous to permit the debtor to compel the return of security given by him; I call this nothing less than the sanctioning of a diabolical act.

3. The internal law overestimates its power when it assumes to prevent the parties from taking part in the business of foreign

exchanges, by making transactions in differences unactionable (see von Bar, ii, p. 19, and Lyon-Caen and Renault, iv, No. 985).

4. When the law prohibits certain categories of persons, *e.g.* officials, from entering into transactions at exchanges, the prohibition does not extend to aliens belonging to that category. The local state does not assume to protect foreign interests, — neither that of the public nor of the official.

§ 174. Bank Transactions.

1. Transactions undertaken by aliens with a local bank or by natives with a foreign bank, within the scope of the bank's business, are governed, as to their legal effect, by the system of law to which the bank is subject.

1. We are here dealing with contracts executed in mass according to a uniform scheme established for all the customers of the bank. It is therefore impossible to give individuality to each separate transaction in the daily business of the bank or to take account of the objective system of law to which its countless customers are subject.

Questions of interest represent an exception, especially where business is done with exotic territories; for the rate of interest may represent, not only payment for the use of capital, but also a premium of assurance.

2. Under the heading of bank transactions may be cited the following:—

- (a) contracts of accounts current; the law under which the bank exists is applicable, *e.g.* to the question as to the effect of carrying forward the balance to a new account (Ger. Imp. Ct., x, p. 53; xviii, p. 246; *A. E.*, xix, p. 408);
- (b) discounting of bills and notes;
- (c) Lombard business;
- (d) deposit accounts, including the renting of safe deposit vaults.

3. The laws of the particular bank and the usages in force at the place at which it is situated also determine by way of the *lex contractus* the privileges of the bank in case of delay by a customer.

4. Warehouses which issue storage certificates, bills of lading and the like, are subject to the same rules as banks in this regard (see Arts. 209 and 844, Sw. Code of Oblig.).

5. The same rule of law is applicable where a state or community conducts pawnshops, storage houses, or retail shops, etc.

II. *The liability of banks in issuing prospectuses and announcements in connection with the floating of securities is determined by the law to which the bank is subject.*

1. Where there are several banks interested, the law of the central or leading bank, or that of the place where the industrial undertaking is to be established, should apply.

2. The position of each individual bank may, however, be different (Cosack, "*Lehrbuch des Handelsr.*," 5th ed., p. 344).

§ 175. Various Forms of Commercial Organizations and their Auxiliaries.

I. *Partnerships and joint associations.*

1. In general it is the law of the business domicile which governs. Jurists, such as Weiss ("*Traité élémentaire*," 2d ed., p. 143), who speak of a national law of joint associations (*Kollektivgesellschaft, société*) also agree with this conclusion. Especially do French jurists regard joint associations as juristic persons of the state of their creation. But even in states where this is not the view (*e.g.* Switzerland), it is the economic activity of such organizations and not the nationality of its members (*socii*) which is considered most important. It occurs most frequently that the members are of different nationality.

2. Where the association has not been validly created at its seat, or business domicile, it cannot be regarded anywhere as valid. There will then be a "*société de fait*" with individual liability. But it does not follow that because the association is invalid that its acts are to be regarded as null.

3. Where a native has become a member of an association having its seat abroad, he has submitted himself as such to the foreign law. This is also the conclusion of the German Imperial Court (xxiii, p. 33).

The liabilities of a member to third persons is governed by the objective law of the seat. Where, therefore, this law permits a member to be sued directly for the debts of the association (*contra*, Art. 564, 3, Swiss Code of Oblig.), he cannot demand that the association be sued first. This is the rule of the Argentine Commercial Code. In England this question is one of pro-

cedure. Even though his personal law does not permit of a suit against him in the first instance, the member may be sued first if the *lex fori* so permits [Dicey, p. 714, citing *Bullock v. Cairo*, L. R. 10 Q. B. (1875) 276. — *Trans.*].

4. The legal nature of a foreign association and the legal qualifications of its officials are questions governed by the law of its seat (*A. E.*, xii, p. 346).

5. The same law also governs the question as to whether a new member of a partnership or association is liable for the debts incurred by it before the time of his joining.

This far-reaching liability exists under the laws of Germany (Code of Comm., Art. 130), Italy (*Codice di Comm.*, Art. 78), and Switzerland (Code of Oblig., 565); not, however, under English law; as to French law, the point is in doubt (see *Annales de dr. comm.*, xiv, p. 281; Lyon-Caen and Renault, "*Traité de dr. comm.*," ii, No. 277). The law of the member's domicile or nationality is here irrelevant.

6. The law of the seat of the association, partnership, or limited partnership determines also: —

- (a) the rights of the members or associates;
- (b) the scope of authority of the business manager;
- (c) the liability of the associates to the creditors.

7. The *lex rei sitæ* determines the real rights of the association to movables or immovables.

8. The liabilities of the individual members in tort are governed by the *lex delicti commissi*. This is in accordance with the generally recognized view, for it is at this place that a rule of law has been transgressed. As we have seen, Zitelmann (i, p. 110) deduces the result from the territorial sovereignty at the place of sojourn.

II. *Stock companies.*

1. The law of the seat governs. The "seat" of a stock company is, in the first instance, that designated in the by-laws (*A. E.*, xv, p. 570). Of course the facts must accord with such designation (Lyon-Caen and Renault, ii, No. 1167; Lehmann, "*Das Recht der Actiengesellschaft*," i, p. 261). But it will require special circumstances to prove that the designation was a mere fiction. The "*siège social*" is authoritative; but this may be different from the

"*siège industriel ou commercial*," as, for instance, where a French company operates a mine in Russia (see Lyon-Caen, ii, No. 1171, note 3).

2. Where a person enters a foreign corporation as a shareholder, he agrees to the application of the corporation law in force in the particular state, either by accepting the by-laws, or, as often happens, by express understanding (*Journal*, ii, p. 446). This applies to such points as:—

- (a) his duty to pay assessments ;
- (b) the notifications to which he is entitled.

3. As to obligations arising out of transactions involving change of ownership of the shares, the system of law is applicable which governs the particular transaction, viz. exchange, purchase, or gift.

4. As to the capacity of corporations to be guilty of civil tort, viz. to be liable as juristic persons for the torts of their official organs, the governing law is that of the place where the official was, at the time of the transaction complained of. The law of the seat is to be referred to only for the purpose of determining the right of the official to act for the corporation. Two cases are possible:—

- (a) the law of the seat may not recognize the capacity to commit a tort ; if not, the corporation will not be liable, as the act cannot be deemed that of the corporation ;
- (b) the law of the seat recognizes the capacity, but the law at the place of the act does not ; the corporation will not be liable here because not guilty of a tort at that place.

In other words, the liability for the act of its official must exist according to the law of the seat *and* of the place where the act occurred. The extent of the liability is governed by the law of the place of commission alone.

The German Imperial Court has held that where the tort complained of was not an affirmative act, but one of omission only, the rights and liabilities of shareholders and creditors were determinable by the law of the business domicile of the corporation. The action was brought by creditors against the officers and members of the board of directors (Civ. Cases, xxxvi, p. 25).

5. The *lex rei sitæ* is applicable when real rights are in question.

III. *Branch offices.*

1. The ordinary rules are applicable also to branch offices in their relations with third persons. The law of the place of the establishment will regularly be applicable to their voluntary legal acts, while the *lex delicti commissi* will apply to torts (except in the case of branches established by juristic persons). Acts of unfair competition (*concurrence déloyale*) also come under the head of torts.

2. Set-offs against a branch are permissible against claims made by the principal establishment. Where a person has business establishments at several places, it is clear that there is only one legal personality (Ger. Sup. Ct. Comm., xv, p. 176). It matters not that the firm name of the principal and of the branch establishment are not wholly identical.

3. The ownership of a branch against which the principal establishment has drawn a bill of exchange is not to be regarded as identical with the ownership of the latter so far as concerns protest, notice, etc.; the draft is to be regarded as an ordinary bill of exchange both by the express provisions of the German Statute of Bills and the commercial usage prevailing in other countries (German Sup. Ct. Comm., xix, p. 204).

4. Branch establishments may have separate trade-marks (see Art. 7, Swiss Stat. of 1890).

IV. *Representatives.*

The place of conducting the business is authoritative in regard to:—

- (a) procurators (Diena, i, p. 220);
- (b) commercial agents.

The German Imperial Court held that a merchant who employs an agent to represent him within a certain foreign territorial district submits to the rules of law applicable at that place to the particular kind of agency (xxxviii, p. 196).

§ 176. Factors and Forwarders.

1. *The rights and duties of the respective parties to a contract of consignment or forwarding are governed by the objective system of law at the domicile of the factor or forwarder (spéditeur), or, in the case of commercial companies, by the law of their seat.*

1. The legal relation of consignor and factor (and of consignor and forwarder) should not be dissected in two parts, as the "centre

of gravity" of the obligation is at the domicile of the factor (or forwarder). This seems the view of the German Supreme Court of Commerce (viii, p. 10).

2. Questions determinable according to the principle as stated are, *e.g.*: —

- (a) the rights of the factor against the consignor (commission, interest, lien, pledge);
- (b) the conditions under which the factor may purchase the goods himself;
- (c) the giving of notice;
- (d) whether the factor was guilty of negligence in regard to damage received by the goods after sale or during consignment to him (*A. E.*, xx, p. 874);
- (e) the rights of the consignor (information, insurance moneys, general responsibility of the factor). In all of these directions, trade usages may be of importance.

3. The same principle applies also to analogous questions in forwarding, viz. as to the liability of the forwarder (Ger. Comm. Code, Art. 408, and Imp. Ct., xlviii, p. 108; *contra* Sw. Code of Oblig., Art. 448), and the duties of the consignor (see as to these, Sw. Code of Oblig., Art. 451). It is the law of the forwarder (*spediteur*) which is authoritative.

II. *The same result is reached by adopting the principle of the place of performance.*

The destination of the goods should not be taken as the place of performance; even though the forwarder has a branch at the final destination, and therefore addresses the shipment to this office, whence it is delivered to the consignee (Imp. Ct., xxxviii, p. 195). However, the *manner* of delivery may conform to the laws and customs prevailing at the destination.

III. *Those who favor the bisection of an obligation would here also apply the law of the respective domicile to the obligation of each of the parties.*

§ 177. Railroad Freight Contracts.

Under this topic we must distinguish between: —

- 1. the law as it exists under the International Convention of Berne, relating to railway freight;
- 2. the law as it exists in states not belonging to this union.

1. *The Law upon the Basis of the Convention*

- C. D. Asser, *Internationaal goederenvervoer langs spoorwegen* (1887).
 Meili, *Internationale Eisenbahnverträge und speziell die Berner Konvention über das internationale Eisenbahnfrachtrecht* (Hamburg, 1887), p. 37.
Id., *Die Unionen über das Recht der Weltverkehrsanstalten und des geistigen Eigentums* (Leipzig, 1889), p. 32.
 Schwab, *Das internationale Übereinkommen über den Eisenbahnfrachtverkehr* (Leipzig, 1891).
 Gerstner, *Internationales Eisenbahnfrachtrecht* (1893).
 Rosenthal, *Internationales Eisenbahnfrachtrecht* (1894).
 Th. Gerstner, *Der neueste Stand des Berner internationalen Übereinkommens über den Eisenbahnfrachtverkehr vom 14 Oktober 1890. Auf Grund der nachträglichen Vereinbarungen und der hierauf beruhenden neuen Fassung des Textes gültig vom 10 Oktober 1901 an unter Berücksichtigung von Theorie und Praxis* (Berlin, 1901).

The Convention was perfected October 14, 1890. To this union belong Germany, Belgium, France, Italy, Luxembourg, the Netherlands, Austria, Hungary, Russia, Switzerland, and (1897) Denmark. It was amended in certain directions by the supplementary convention prepared at the conference of Paris in 1896, and these amendments were declared ratified by all parties to the original Convention, October 10, 1901 (see the Periodical for International Freight Transportation, issued by the central office in Berne, ix, p. 225). The amendments refer to Arts. 6, 7, 15, and 44 (see Gerstner, cited *supra*).

I. *Within the jurisdictions which have accepted the Convention, railway freight contracts are governed internationally by a uniform system of law.*

1. The code of law relating to railway freight thus adopted is not only a codification of rules of private law, but also includes certain rules of procedure (see Arts. 23 and 56). The Convention does not refer to the carriage of passengers or baggage.

2. The Convention states under what conditions of transportation and to which railroads it applies. The following requisites must be present:—

- (a) the shipment of goods under a through bill of lading ;
- (b) the shipment of goods from the territory of one treaty state to that of another ; the Convention refers to transportation *exclusively within* territories in which it is in force (*H. E.*, xx, p. 290) ;
- (c) a railway route which has been admitted through certification of list and map as suitable for international traffic.

A railway freight contract for transportation between Valencia and Zurich cannot be dissected into two parts so as to say that as Spain is not a party to the treaty, Spanish railroad law applies to the route in Spain, while the International Convention applies to the route through France and Switzerland.

3. The railroads designated as international routes are subject to rules of compulsory carriage and of direct transportation (Art. 5). This is a logical extension of the internal rules so as to compel direct traffic between railroads throughout the treaty territory. This naturally results in far-reaching obligations relative to crediting other railroads for freight and disbursements (Art. 23).

II. *The substantive provisions of the Convention contain uniform rules relative to liability for loss or injury to goods or for delay in delivery.*

1. A joint and several liability on the part of the receiving and delivering roads with that of the road on which the damage occurs is enacted by Art. 27. The principle applies both to damage for loss or injury and for delay (Periodical for Int. Trans., iii, p. 71).

2. Local customs are taken into consideration with respect to the manner of delivery at the point of destination (*H. E.*, iii, p. 260).

2. *The Law in Countries not Parties to the Convention*

I. *Railway freight contracts (and for the carriage of passengers) are governed by the law of the seat of the carrier.*

1. We have here again transactions entered into in large numbers according to a uniform scheme. It is therefore natural that the law governing the transporting institution should control.

2. The fact is immaterial that a foreign carrier maintains a branch in the inland. Foote in his "Treatise on Private International Law," p. 345, cites such a case (*Cohen v. South Eastern R.R. Co.*, L. R. 2 Ex. D. 253) in which indeed English judges were of widely different opinions. Von Bar (ii, p. 20), in view of this case, thinks that the local consignor may rely either upon the *lex loci contractus* or upon that generally governing the company. It is the business of the company to prevent this by setting up special conditions.

II. *Certain systems of railroad law outside of the Convention provide for a joint and several liability of the receiving and delivering roads with that on which the injury occurred.*

In America and England

The tendency in these Jurisdictions was first toward determining the interpretation of a contract for the carriage of freight by the *lex loci contractus*. This resulted mainly from the fact that the place of the contract is most frequently also the place of the carrier's principal office (see *Kline v. Baker*, 99 Mass. 153; *R.R. v. Shand*, 3 Moo. P. 6 (Eng.) 290). The preponderance of authority is now substantially as stated by the author (see, besides the case of *Cohen v. R.R.*, *supra*, also *Re Missouri S.S. Co.*, 1889, L.R. 42 Ch. D. 321; *McDaniell v. R.R.*, 24 Ia. 412; *R.R. v. Smith*, 74 Ill. 197). Where the place of the contract *coincides* with the carrier's principal office, the courts are still inclined to state the law as though the *lex loci contractus* was alone authoritative (*Robertson v. Nat. S. Co.*, 37 N.Y. Supp. 69; *Fairchild v. R.R.*, 148 Pa. St. 527; *Ryan v. R.R.*, 65 Tex. 13).

NOTE

The countries of Europe have also entered into a treaty (1887) relative to *technical* matters of railway transportation (see Meili, *Internationale Eisenbahn-verträge*, p. 29).

§ 178. Carriage on Inland Waters.

Unless the contrary is to be found in positive legislation, there is no joint and several liability on the part of connecting carriers upon inland waters.

The Convention of Berne covers only *railway* carriage; it does not refer to carriage by water.

§ 179. Contracts of Insurance.

v. Bar, ii, pp. 148-150.

Ehrenberg, *Versicherungsrecht*, i, pp. 281, 416-419.

I. *Contracts of insurance, so far as the obligation of the insurer is concerned, are subject to the law which prevails at the place where the principal seat of the company is located.*

1. It may be said that the whole machinery of assurance is more or less on a uniform basis, and that here also we are dealing with contracts in masses.

2. Von Bar agrees with this solution, as does Wharton (§ 465):—

"The law defining the insurer's engagements is that of the place where the corporation issuing the policy has its seat ; and where the loss, if it be incurred, is to be paid."

II. *Foreign insurance companies are frequently subjected to the internal private law, especially where they have established general agencies or sub-directorates in the local state.*

1. It cannot be said that these are branch establishments in the technical sense, but the principle is justified particularly in cases where the policy is made out in the language of the local state and the attention of the policy holder is not distinctly called to the law as prevailing at the seat of the company.

2. The American doctrine is still broader, and is stated by Wharton in the following terms :—

§ 466. "An insurer, however, doing business in a particular state by an agency with power to act, puts itself by so doing under the control of such state law. The agency then becomes the seat of the obligation."

Moore, in his notes to Dicey, states the American practice as follows (p. 584):—

"A contract of insurance is governed by the law of the place where it is made, which is usually the place where the policy is delivered and becomes effective."

English practice lays great stress upon the place where the contract is perfected and becomes binding in form, so that it is important to determine whether it becomes binding by the agent's subscription or that of the directors.

3. The subjection of the foreign company to the local law is sometimes specially provided. Usually the concessions of the German states to foreign insurance companies read that they shall sue and be sued in the local courts, *i.e.* select and accept their jurisdiction (*"Recht zu nehmen und zu geben"*), or as the concessions of Coburg-Gotha read, "as though the company had its seat in Coburg-Gotha." The internal law as opposed to local jurisdiction is mentioned only by Brunswick and Hesse-Darmstadt, in which states concessions are granted only under the condition that the company "submits itself to the local laws and administrative regulations in regard to business conducted within the local state."

In this connection reference is also to be made to the Imperial Statute of May 12, 1901, relative to private insurance undertakings.

III. *Transactions connected with the policy itself are, as a rule, also governed by the law prevailing at the seat of the insurer.*

1. First, as to transfers of claims arising from the contract of the insurance, the domiciliary law of the insurer governs, as the law of the obligor or *debitor cessus* is authoritative, except as to the liability of the transferrer, to which *his* domiciliary law is applicable (see § 110, *supra*).

2. This applies also to pledges, being of the nature of transfers.

The rule does not apply to the sale or pledge of policies payable to bearer, as here the law of the place where the sale or pledge became executed will govern. This follows from the nature of the original obligation.

§ 180. Torts in Commercial Law.

I. *The lex delicti commissi is authoritative.*

It is clear that also in commercial matters a claim for damages may arise out of a tort or *quasi-tort*, the facts of which are connected with different jurisdictions of law. Reference is again to be made to §§ 128 and 129, *supra*.

1. A merchant in Zurich receives from X in Lyons favorable information as to the credit standing of a customer. After loss has occurred, he sues X for damages upon strength of Art. 1384, French *Code civil*. The question arises whether French or Swiss law is applicable.

The defendant might claim that the tort became complete only with the receipt of the letter by the plaintiff in Zurich, and that, therefore, Swiss law should apply. The German Imperial Court (xxiii, p. 306) held that in such case a homogeneous tort is presented, connected, however, as to the facts, with two different jurisdictions. The commission of the tort was begun with the mailing of the letter, but was not completed until it was received and relied on; that therefore both places must be regarded as the place of commission. A prior decision of the same court (xix, p. 383) stated that in such a case only the *attempt* took place at the place of mailing, and that the true invasion of a right had not yet occurred there. The later decision states, however, that it was not intended that the law of the place of receiving the letter should be the sole standard in such cases.

2. A banker domiciled at Vienna holds a conference with a

person in Berlin, in which he advises him to purchase certain Austrian securities, while at the same time he proceeds to sell his own. His liability, if any, is determinable by German law.

3. A German domiciled in Germany is guilty of an alleged act of unfair competition in Belgium, either through his own conduct or through the act of an agent. Belgian law is authoritative.

4. Where injury has been caused in the local state by a foreigner who, from his own country, has circulated injurious matter by circular or newspaper in the local state, the local law will be applicable.

5. Minors who falsely represent themselves as adult, or as authorized merchants, should be held responsible for this tortious or *quasi-tortious* act according to the law of the place where the tort occurred (Austrian Civil Code, Art. 866; Swiss Code of Oblig., Art. 33).

II. *Of course it is a question for itself as to how far a judgment rendered in any of the cases described will be executed at the domicile of the defendant.*

LAW OF BILLS AND NOTES

SPECIAL AUTHORITIES ON THE INTERNATIONAL LAW OF BILLS AND NOTES

A

- v. Bar, ii, pp. 150-185.
Grünhut, *Wechselrecht* (1897), ii, pp. 568-585.
Renaud, *Wechselrecht*, 3d ed., § 8, pp. 28-37.
H. O. Lehmann, *Lehrbuch des deutschen Wechselrechts* (1886), pp. 125-132.
Goldschmidt, *System des Handelsrechts im Grundriss*, 3d ed., pp. 251-256.
Thöl, *Wechselrecht*, § 16.
Canstein, *Lehrbuch des Wechselrechts* (1890), § 8, pp. 95-104.
Endemann, *Handbuch des Handelsrechts*, iv, part 2, pp. 328-330.
O. Wächter, *Encyklopädie des Wechselrechts der europäischen und aussereuropäischen Länder auf Grundlage des gemeinen Deutschen Rechts* (1881), pp. 95-110.
Esperson, *Diritto cambiale internazionale* (Florence).
Contuzzi, in Böhm's *Z.*, i, pp. 572-582.
Id., *La cambiale nel diritto internazionale privato* (1899).
Pardessus, *Cours de droit commercial*, 4th ed., v, Nos. 1475 *et seq.*
Chrétien, "*Étude sur la lettre de change dans ses rapports avec le droit international privé*," in *Revue de dr. i.*, vi, pp. 5-56, 196-229.
Lyon-Caen et Renault, *Traité de droit commercial*, iv, Nos. 624 *et seq.*
Surville et Arthuys, *Cours élémentaire de droit international privé*, 3d ed., p. 558.
Champcommunal, *Étude sur la lettre de change dans le droit international* (1894).
Printed also in *Annales*, viii, p. 1.
Weiss, iv, pp. 404 *et seq.*

B

- S. Borchardt, *Vollständige Sammlung der geltenden Wechsel- und Handelsgesetze aller Länder*, i, ii (1871).
O. Borchardt, *Sammlung der seit dem Jahr 1871 publizierten Wechselgesetze* (1883) *mit einem Nachtrage*: "*Das italienische Wechselgesetz*" (1883).
Späing, *Französisches, belgisches und englisches Wechselrecht im Anschluss an die Deutsche Wechselordnung* (1890).
Oskar Wächter, *Das Wechselrecht des Deutschen Reiches mit eingehender Berücksichtigung der neuen Gesetzgebungen von Österreich-Ungarn und Belgien* (1884).
Id., *Encyklopädie des Wechselrechts der europäischen und aussereuropäischen Länder* (1881).

§ 181. Introductory Remarks.

Bills of exchange and promissory notes play a rôle so extraordinarily important in modern legal relations that it is necessary to

treat of them also from the international point of view. Even as early as Ulrichus Huber their high importance as negotiable instruments was recognized ("*De jure civitatis*," *lib. ii, sec. vi, cap. iv*, No. 29). In modern intercourse the bill represents an absolutely indispensable medium of credit and payment, especially as it serves to reduce to a common level the various systems and standards of coinage by a simple arithmetical operation. The establishment of a universal system of coinage seems a matter still in the distant future.

I. *In determining rights and obligations by bill or note, a number of different systems may present themselves for application, e.g. :—*

1. the place of entering into the contract pursuant to which the bill is drawn ;
2. the place of drawing the bill ;
3. the place of delivering it to the payee ;
4. the place where value was received ;
5. the place where its acceptance is to occur ;
6. the place of payment ;
7. the domicile of the drawee ;
8. the place where action is brought ;
9. the place settled by the parties themselves to determine their rights.

Transactions conducted with bills are commercial in nature and we will therefore have little to do under this topic with the national law of the parties. The law of the place of business or domicile will be found authoritative for the most part both in relation to the origin of the obligation and its legal effect. As performance regularly takes place at the domicile of the drawee, the *lex fori* will appear to be applicable in most instances, although this is only "*in grosso modo*"; the domicile may change.

The English and American rule, according to which contracts are generally referred to the *lex loci contractus*, arrives at the same results in regard to bills and notes as the Continental European rules.

II. *It is especially upon the Law of Bills that efforts are being made toward the establishment of an internationally uniform system. This tendency is to be encouraged.*

A. v. Hovy, *De beginselen van het internationaal wisselrecht* (1858).

G. Cohn, *Beiträge zur Lehre vom einheitlichen Wechselrecht* (1880).

Esperson, p. 110.

Chrétien, pp. 221-222.

Pappenheim, in *Goldschmidt's Z., N. F.*, xiii, p. 509.

Riesser, *Revisionswünsche mit Rücksicht auf die Uniformierung des Wechselrechts. Beilageheft zu Goldschmidt's Z.*, xxxiii, pp. 112 and 116.

Jaques and Borchardt, "*Principles for an International Law to govern Bills of Exchange*," printed in the Report of the Fourth Annual Conference of the Association for the Reform and Codification of the Law of Nations.

1. Grünhut remarks in the preface to his large work, that in this division of the law it would be easier than in any other to overcome the difficulties in the way of a cosmic unification. The author then adds elegantly, "The fruit is ripe; it is but necessary to reach out our hands to pluck it."

2. The Assembly of German Jurists (*Juristentag*) of the year 1872 adopted the following resolution:—

"The creation of a common Law of Bills for the countries of Europe and the United States of North America is in accordance with the present state of the science of the law, and is demanded by international commercial intercourse and credit."

3. The efforts already made toward unifying the Law of Bills are well worthy of attention, three especially requiring mention, viz.:—

- (a) The *Institute de droit international* has occupied itself with the question (see *Annuaire*, vii, pp. 53-89; viii, pp. 96-123).
- (b) The Association for the Reform and Codification of the Law of Nations (now called the International Law Association) agreed upon twenty-seven rules at its meetings of 1876, 1877, and 1878 (Bremen, Antwerp, Frankfort); they are known as the Bremen rules. The conclusions arrived at in 1876 are contained in Bulletin vi, p. 195, and in the Report of the Fourth Annual Conference, p. 23; those of 1877, in Bulletin vii, p. 371.
- (c) The Belgian government initiated an international congress which met at Antwerp, 1885, and at Brussels, 1888. See Lyon-Caen, in *Journal de dr. i.*, xii, p. 593, with the *projet de loi*; von Bar, ii, p. 183.

The conclusions reached by the congress are printed in the *Actes du congrès int. de Bruxelles*, pp. 529-559. I repeat here, as in my pamphlet treating of tasks laid upon modern jurisprudence (Vienna, 1892), that the *loi*-type of this conference is a still-born creation. Since this conference, the tendencies toward unification

have subsided, a fact much to be regretted. As Thaller well says, in *Bulletin de la législation comparée* (1900, p. 788):—

"Cette unification est très souhaitable. Il n'existe pas un titre qui ait une nature cosmopolite plus caractérisée que l'effet de commerce."

Bernstein points out the urgent necessity for an internationally uniform law upon instruments payable to bearer and to order (*"Die Revision der Wechselordnung,"* 1900, p. 79).

In the event of accomplishing the desired aim, the principal international problems of the Law of Bills, will, of course, disappear.

III. *Usages of exchange are of importance also in this branch of law.*

NOTES

1. There have lately appeared detailed historical works upon the Law of Bills. They are referred to comparatively by Huvelin, in *Annales de dr. commercial*, xv, pp. 1-30; e.g. Freundt, who has discussed the Law of Bills of the Postglossators (1899), and Grasshoff that of the Arabs (1900).

2. J. Voet, *"Comment. ad Pandectas,"* iii, p. 819 (*lib. 22, tit. ii, No. 10*):—

"Qui in quibusdam circa cambiorum jura variant leges ac consuetudines variorum regionum, notandum est, in decidendis circa hæc controversiis spectandas esse leges loci illius, ad quem literæ cambii destinatæ et in quo vel acceptatæ sunt vel acceptari debuerunt, non item loci unde missæ, cum illic contractus intelligatur celebratus, ubi implementum ejus destinatum est."

Thus, among others, the *"lex contraxisse"* is cited (*L. 21 O. et A. 44, 7*).

§ 182. Rules of Conflict in the Law of Bills and Notes.

Positive provisions are few in number.

I. *None are to be found in statutes of countries following the French system.*

II. *It is otherwise, however, in countries which have followed the lead of the German Statute of Bills.*

1. The German Statute of Bills contains a title which at least promises much, in that it treats of "foreign law" (Arts. 84-86). The German statute is in force in Austria, but not in Hungary. Kuntze is of the opinion that the German statute is in harmony with the elementary principles of international law as approved in practice (*"Deutsches Wechselrecht,"* etc., p. 116).

Notwithstanding the identity of the German and Austrian Statute of Bills differences may arise in the judicial interpretation of the rules. But this is really no question of International Private Law. Where the practice of the courts in either country differently

interprets the same provision, only the judge who applies the law can determine the correct solution, even though the law of the other country be applicable to the issue (German Sup. Ct. Comm., xv, p. 209).

2. The precedent set by the German statute in this title has been followed verbatim by the following countries besides Austria :—

- (a) Servia, §§ 168–170 ;
- (b) Denmark, Norway and Sweden, § 84–86 ;
- (c) Hungary, §§ 95–97 ;
- (d) Switzerland, Code of Obligations, Arts. 822–824 ;
- (e) Russia (1903), §§ 82–83.

As we are to discuss these provisions in their proper relation, no further mention need be made of them here.

III. *The English Bills of Exchange Act of 1882 contains express rules of conflict. This precedent is exceptional in English statutory practice.*

The provisions are to be found in Art. 72. Dicey adopts part of the article verbatim in his work (Rule 160) and uses also Arts. 57, 83, and 89 (Rules 161, 162, 163 ; see also Rules 164–166).

Art. 72 reads as follows :—

“Where a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows :—

1. The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity, as regards requisites in form, of the supervening contracts, such as acceptance or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made.

Provided that :—

- (a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.
 - (b) Where a bill issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.
2. Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made. Provided that where an inland bill is indorsed in

- a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.
3. The duties of the holder with respect to the presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonor, or otherwise, are determined by the law of the place where the act is done or the bill is dishonored.
 4. Where a bill is drawn out of, but payable in, the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.
 5. Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable."

IV. *The rule again holds good that reference and re-reference are not permissible unless expressly sanctioned by statute.*

1. Staub, in his commentary to the German Statute of Bills (2d ed., p. 214, *ad* Art. 84, § 2), says that German law becomes applicable if the *lex patriæ* provides that the domiciliary law should govern. This view is incorrect (see *supra*, § 46).

2. But we have already noticed the express provisions of Art. 7, subs. 1 and 3, and Art. 27, Introductory Act (see *supra*, § 58, III).

§ 183. Civil Law relating to Bills and Notes.

H. O. Lehmann, *Lehrbuch des deutschen Wechselrechts*, pp. 117 *et seq.*
 Carl Wieland, *Der Wechsel und seine civilrechtlichen Grundlagen* (1901).

I. *The distinction made in internal private law between the Law of Bills proper and ordinary civil law relating to bills is of importance also in international matters.*

Where the right or claim does not arise out of the Law of Bills proper (or the law merchant), the *ordinary* rules of International Civil and Commercial Law will apply. The principle which is most often applied in Commercial Law will here also apply analogously, in the absence of other standards, viz. that the obligor remains subject to the law of his domicile, except in regard to capacity to act, which, under some systems, is subject to the *lex patriæ*.

Ordinary rules of Civil Law, as distinguished from the Law of Bills proper, will be found applicable to the following questions:—

1. Preliminary contracts in which a promise is made to accept a bill (see *v. Bar*, ii, p. 185). Such a contract is independent of the Law of Bills proper (Thöl, "*Wechselrecht*," § 51). The obligor is here the party who afterward becomes the creditor of the obligee.

2. Whether a general civil liability exists, though there be a failure of one or more of the legal essentials of a bill (Art. 7, Ger. Stat. of Bills; Art. 725, Sw. Code of Oblig.). Thus, Art. 820 of the Swiss law declares that instruments signed with a cross instead of a name have no "force as bills."

The German Supreme Court of Commerce (xxii, p. 304) has held that the mere drawing of a bill is not in itself the creation of an underlying relationship of debtor and creditor. The Swiss Federal Court holds that the drawer of a bill simply records the fact that he wishes to be liable out of the bill itself—nothing more. "Whether there has been a liability in civil law is to be determined solely by the underlying relationship between the parties at the time; an invalid bill comes into question only as a means of proof" (*A. E.*, xiii, p. 233).

3. The question as to what general legal rights arise where those flowing from the instrument itself have been lost because of failure to obey certain formal rules (see Art. 83, Ger. Stat. of Bills; Art. 813, Sw. Code; France, Lyon-Caen and Renault, iv, No. 458).

4. The question as to the rights of an indorsee who has parted with the bill simply *in procura* or for collection (Art. 735, Sw. Code).

5. The question as to what rights arise where a person recognizes an obligation under a bill in the form of an avowal, say before witnesses, *e.g.* by declaring that an acceptance, not valid legally, shall count as such (Ger. Sup. Ct. Comm., xxi, p. 163).

6. Questions of agency, *e.g.* as to the obligations of a person who, by his own signature, has made another liable upon the bill itself.

7. The question as to what rights arise from assignments of non-due and of protested bills, in contradistinction to indorsements.

8. What legal relations exist between the surety on a bill and the principal debtor and between the surety and possible co-sureties

(Art. 809, Sw. Code; *A. E.*, vii, p. 11); also as to whether the surety may compel indorsement of the bill to him after payment.

Where a guaranty for the payment of a bill or a succession of bills to be drawn in the future is made by separate instrument, most countries do not recognize an obligation within the Law of Bills proper. The law of France, however (Art. 142, *Code de Commerce*), gives effect to such a guaranty under the strict provisions of the Law of Bills.

II. *Statutes of countries in the French group do not differentiate civil rights and liabilities from those arising under the bill to the same extent as do the statutes of the German group.*

French law (*Code de Comm.*, Art. 115) establishes a connection between the obligation constituted by the bill and the fund in the hands of the drawee to cover it (*provision*). This fund may consist of goods sold to the drawee, or even of the credit which the drawee bank opens for its customer. In France the holder of a bill has, according to constant practice, a special right against this fund, which becomes important in the event of the bankruptcy of the drawee. This right goes with the bill upon indorsement.

The doctrine of cover exists also in Scotland (Bills of Exchange Act, § 53) but not in England nor in countries of the German group. Thus cases of conflict may arise. Von Bar (ii, p. 183) is of the opinion that the fund or cover is transferred only in case the bill involves an assignment of it both by the law of the drawer and that of the drawee. This may be disputed. It would seem rather that the law of the place of drawing was applicable, unless the bill be drawn in a manner different than required at that place. It is difficult to understand why the doctrine of cover has not been finally done away with; it involves a confusion of the Law of Bills proper with civil law. In reality, it cannot be construed either as a passing of ownership or the transfer of a claim (*cession de créance*).

III. *Certain relationships of a civil nature are, nevertheless, regulated in statutes relating to bills.*

We refer to questions arising from the subscribing of bills by an unauthorized agent (*falsus procurator*) in the name of the supposed principal. In this case no liability arises from the bill itself (Art. 95, Ger. Stat. of Bills; Art. 821, Sw. Code).

In America and England

The distinction drawn by the author between obligations under the bill, and other obligations is more important in countries of the Continent, than in America and England, for the reason that summary procedure and execution are there given for obligations arising from the Law of Bills proper (*wechselrechtlich*). Summary procedure, or "summary diligence" as it is still called in Scotch jurisprudence, exists in Scotland, but has been abrogated in England (see Chalmers, Bills of Exchange Act, § 98 and note). The distinction has some importance, however, in determining, in a similar way, whether or not the instrument is recognized as negotiable by the law merchant so as to render proof of consideration unnecessary and to be free from equities (see *Curran v. Witter*, 68 Wis. 16; *Bristol v. Warner*, 19 Conn. 17; *Deyo v. Thompson*, 53 App. Div. (N.Y.) 12).

§ 184. Capacity to be obligated upon Bills and Notes.

v. Bar, ii, 150.

I. *By legislation in some countries, the capacity to be obligated upon bills of exchange is dependent upon the personal law of the obligor.*

1. The *lex patriæ* has been adopted by:—

- (a) Art. 12, Portuguese Code of Commerce;
- (b) the law of France. There is no express rule of conflict applying particularly to the *Law of Bills*. Arts. 113 and 114 of the Code of Commerce, which provide that the subscription to a bill by a married woman shall be taken merely as an evidence of indebtedness and that of a minor shall be void, is not of this character. *Surville et Arthuys*, p. 560, lay down the rule thus:—

"The capacity of a person who obligates himself by bill of exchange as drawer, drawee, indorser or surety is determined by his national law. We have framed this rule without distinction as to whether the obligation is civil or commercial in nature. . . . We recognize that the danger is very great in regard to bills where the circumstances make it difficult to know the capacity of precedent obligors."

The same opinion is supported by Weiss (iv, p. 423). He relies upon Art. 3, *Code Civil*, and its application to aliens (see § 58, I, 2, *supra*). He adds, however, that in practice the

tendency is not to observe the personal law where a Frenchman's interests would be injured, provided he has not been guilty of negligence (see § 58, III, *supra*). Weiss is opposed to this practice on principle (iii, p. 149).

2. Such systems as determine the personal statute by the law of the domicile apply that law also to transactions by bill or note.

II. *Some systems of legislation make the status in regard to bills dependent upon territorial law.*

To this group belong:—

1. *Germany* (Art. 84, Stat. of Bills; Art. 7, Introd. Act). By reason of the provisions of Arts. 7 and 29, Introductory Act, it would have been unnecessary to define the capacity of aliens as to bills. Still, Art. 84, Stat. of Bills, provides:—

“The capacity of an alien to undertake obligations by bill will be determined by the law of the state to which he himself belongs. But an alien who, by the law of his own country, has not that capacity, will be bound by undertaking such obligations in this country, if by the laws of this country he has capacity so to do.”

Thus the personal law governs in the first instance, though an important exception in favor of German law is added immediately after. The minutes of the Leipzig Conference upon the Law of Bills (issued by Thöl, Göttingen, 1866) show that the committee wished to observe the urgent demands of the business community in view of the fact that buyers frequently come to Germany from far distant countries, especially to the fairs. Reference was made also to the formula of Hugo Grotius, by which an alien undertaking an obligation in the inland by bill was considered as “*subditus temporarius*” and thus subjected to the local law.

Under the German Statute of Bills and in the countries following that statute, it does not expressly appear whether an alien entering into an obligation by bill with another alien of the same or different country is bound by the territorial rule of Art. 84. A difference of opinion may exist upon the point, though to me it would seem unsound to make a distinction. Even though we might interpret a similar rule in International Civil Law in this manner (see § 59, II, 3, *supra*), the *Law of Bills* does not permit of such differentiation.

2. *Switzerland* (Art. 822, Code of Obligations). Differing somewhat from the German statute, this statute provides that its

provisions shall be applicable to Swiss subjects abroad, as well as to aliens in the inland, in respect of their capacity to undertake obligations by bill. This, however, seems to have been modified by Fed. Stat. *N. & A.*, Art. 28, No. 2 (§ 7, III, 4, *supra*).

Another peculiarity of the Swiss Law of Bills lies in the fact that although persons having capacity to obligate themselves by contract have capacity to obligate themselves by bill, still the special provisions as to procedure and execution in actions upon bills are applicable only to persons inscribed in the commercial register (Art. 720, Code of Oblig.). This is fundamentally illogical and arbitrary, and tends to delude, especially foreign holders of bills.

3. *Italy.* The standard is different here from that followed in Civil Law, as Art. 58, *Codice di Commercio*, applies also to the Law of Bills. In other words, the *lex loci contractus* is applicable, and Art. 6, *Disposizioni*, is expressly excluded (see § 162, II, 4, *supra*.)

Esperson (" *Diritto cambiario internazionale*," pp. 3, 4, 9; published 1870) holds that the general rule of Italy upon status should apply also in regard to bills. This he repeats in *Journal de dr. i.* (vii, p. 259) in the year 1880; he opposes the legislative policy of Art. 84 of the German statute in the following words, "It is contrary to the principles of International Private Law by which we have seen that the character of incapacity impressed upon an individual by the legislature of his country remains indelible and follows him to a foreign country in the same manner as does the capacity which this legislature recognizes."

4. *England and America.* The *lex loci contractus*, i.e. the territorial law, is applied to the capacity to become obligated on a bill, just as capacity generally is so determined (see § 58, IV, *supra*; Phillimore, iv, § 838, p. 686). An error which is very common among Continental jurists is to believe that it is the domiciliary law which controls in these Jurisdictions.

III. *It follows, then, that the question whether an alien in the inland or a native abroad has capacity to be obligated upon a bill, is to be answered variously according to the particular rule of conflict.*

1. Where the *lex patriæ* governs, the question of minority or majority will be determined by it, and a foreign interdiction with its resulting disabilities will also be taken account of.

2. Not so, however, where the capacity to be obligated upon a bill is determined by the *lex loci contractus*.

3. A foreign tradeswoman may obligate herself by bill within the scope of her occupation, unless, of course, the territorial law wholly repudiates the distinction between tradeswomen and ordinary married women.

IV. *As a question of legislative policy, it seems clear that the two extremes (the lex patriæ on the one hand and the territorial rule on the other) go too far, and that a neutral point should be reached.*

1. It is interesting to note that Art. 84 of the German statute was accepted only by a vote of 10 to 9 in the Conference (Minutes, ed. by Thöl, p. 156).

2. Norsa proposed the following before the Institute of International Law (*Annuaire*, 1883-1885, vii, p. 81):—

“Art. 2. The capacity to be obligated by bill of exchange or to order, as to those who are alien to the present law (*viz.* subjects of states who do not adopt the law), is determined by the law of the country to which they belong.

Art. 3. Provided however that an alien incapable of obligating himself by bill of exchange or to order by the law of his country but capable of so doing by the present law, may be considered as validly obligated over against a *bona fide* contractor and his transferees, so far as concerns transactions by bill or note occurring in countries where this law is in force.”

However, this “*sententia media*” was not adopted by the Institute at its meeting in Brussels, where a project for a uniform law was adopted. In its stead a provision was substituted following the rule of *lex loci contractus* (*Ann.*, viii, p. 97); this was adopted also by the International Congress of Brussels in 1888 (*Actes*, pp. 530, 550), and the Association of International Law (*Revue de dr. i.*, ix, p. 409).

On the other hand, von Bar proposes the following sound solution (ii, p. 155, note 17):—

“Every one who can bind himself by any contract can do so by bill. It shall be immaterial whether or not a person had capacity to bind himself by bill, be that incapacity a result of a general incapacity to contract or not, if, by the law of the place where the bill is issued, the debtor had this capacity, and the person who sues on the bill or his predecessor in title was acting in good faith when he acquired the bill. Good faith is presumed.”

As its author points out, the principle of regarding nothing but the "*bona fides*" of the person who acquires the bill guarantees a wider security and accords with the rational demands of commerce.

We favor, however, the application of the *lex loci actus* in regard to capacity of aliens to be obligated on commercial paper at markets, fairs, and exchanges. So formal an act as the drawing of a bill, should contain, in itself, the assurance of capacity at markets and fairs. As we have seen, the conditions at markets and fairs influenced the discussion of the German statute. Bluntschli referred to the fact that foreign buyers were accustomed to pay transitory visits to Germany, making it essential that they be bound with the strictness which the Law of Bills demands ("*Allgemeine Deutsche Wechselordnung*," p. 128).

As a rule, the *loci actus* is the place where the actual fact of drawing (or indorsing) occurred; capacity cannot be altered by choosing a different venue for the act, as the provisions upon capacity are independent of the will of the parties. The requisite that a place of payment must be given in the bill (Art. 4, No. 8, Ger. Stat.; Art. 722, No. 8, Sw.) has no significance in respect of capacity (Ger. Sup. Ct. Comm., xxiii, p. 388).

In America and England

The rules applicable generally to capacity to act govern also in respect of negotiable paper. The English statute (§ 22) provides that "capacity to incur liability as a party to a bill is coextensive with capacity to contract." Although not intended as a rule of conflict, this rule serves to reflect the attitude of English law that every person who has general capacity to act is capable of incurring liability by bill. Wharton (§ 110) also points out that while the law of the domicile will prevail, no artificial restrictions upon such capacity will be recognized extra-territorially. In other words, though the *lex domicilii* is admitted to be the standard theoretically, yet the courts have considered so many restrictions by foreign legislation to be "artificial," that, as the author states, the standard is practically the *lex loci contractus*.

Questions of conflict in regard to capacity to be obligated by bill or note are considerably limited by the fact that acceptor and indorser warrant the capacity of all prior parties (§§ 112, 115, Uniform American Negotiable Instruments Law).

§ 185. Autonomy of the Parties in the Law of Bills and Notes.

I. *Contract provisions by which the parties subjected themselves to a foreign system of law formerly played an important rôle in the Law of Bills.*

Compare: Bender, "*Grundsätze des deutschen Wechselrechts mit steter Berücksichtigung der Gesetzgebung und Wissenschaft des Auslandes*" (1828), ii, pp. 321-324.

II. *The so-called autonomy of the parties is to-day permitted in only a few directions.*

1. Reference may be made to:—

- (a) the payment clause (Ger. Stat. of Bills, Art. 37; Sw. Code, Art. 756);
- (b) the protest clause (Ger. Stat., Art. 42; and Sw. Code, Art. 763);
- (c) the presentment clause (Ger. Stat., Arts. 19, 25, 31, and 43).

2. A subjection to the application of a foreign system of law is now possible by mentioning a particular place of payment in the instrument.

The use of a foreign language or foreign formula in drawing a bill or check does not warrant the deduction that the foreign system of law is applicable. Thus where a bank in Berlin issues a bill or check according to the English formula, it does not follow that the bank has subjected itself to English law, even though the instrument was intended to be used as a means of payment in England (Ger. Imp. Ct., vol. 44, p. 155).

§ 186. General Principles applicable to the Substantive Import of Obligations upon Bills and Notes.

v. Bar, ii, p. 163.

Grünhut, *Wechselrecht*, ii, pp. 571-578.

I. *The substantive import of obligations by bill, independent of the question of capacity, is determined by the law existing at the place where they were entered into.*

1. This proposition will usually direct us to the domiciliary law of the obligor because, as a rule, the two places will be identical. The reason for applying the *lex loci actus* here is because we are dealing with a strictly unilateral transaction, and further because the formality in which it is clothed completely hides the basis of

the debt—it is the instrument itself which forms the “*causa*” of the transaction. The legal act as such thus rests upon certain formal requisites, and the rules relating to it are imperative in character. Instruments of this nature executed by natives or aliens at home and abroad are legally drawn only when the requisites prescribed by the law prevailing at the place of execution have been observed.

2. It is often said that we have here a question of form. But form has a special significance in the Law of Bills and the rules applicable thereto in International Civil Law do not apply, or else with modification. Accordingly, the law of the place of payment will not control. Grünhut (ii, p. 572) appropriately points out that commercial paper, as such, owes its entire existence to the law of the place at which it is executed.

3. The *lex loci contractus* will determine whether a paper writing shall be regarded as a bill, a mere check, or a simple acknowledgment of indebtedness. We will consider an exception to this principle under II.

For example, the German and Swiss statutes recognize neither bills payable to bearer, nor promissory notes in which the maker is designated as payee, even though a particular place of payment is mentioned.

II. *The statutes of the German group* (Art. 85) *specify two exceptions.*

1. Writings or declarations (*e.g.* indorsements, etc.), placed upon a bill in a foreign country after its issue, will be deemed valid obligations if in accordance with the demands of the internal law, though not legally binding by the foreign law of the place where they were entered into. This applies also to bills originally issued in the foreign state.

This exception becomes practical in many ways. Thus the sacred expression or label “bill,” or an equivalent, is absolutely essential by German, Scandinavian, and Swiss law, but not by the law of England, America, France, or Belgium; furthermore, bills payable to bearer are permitted by the law of England, America, and (with a minimum limitation) Japan. The law of France requires that the original bill and all indorsements must be stated to be for value received.

A bill issued in France, England, or America without the words

"*lettre de change*," "bill of exchange," or the "value" or "order" clause, although invalid by the internal laws of Germany, Austria, or Switzerland, must nevertheless be recognized in these countries, if a new transaction has been superimposed by indorsement or otherwise upon the original instrument. So also as to bills or notes payable to bearer.

2. According to Art. 85 of the German Statute (par. 3) an obligation entered into by bill in a foreign state between two natives is valid if the internal law (of Germany) would so consider it, had it taken place in the inland. Two inlanders therefore have the choice of following either their *lex patriæ* or the *lex loci actus*. See also Lyon-Caen and Renault, iv, No. 636. But this privilege is not accorded where only one of the parties is an inlander, even though the bill finally gets into the hands of another inlander.

Von Bar proposes for future legislation the following provision: —

"It suffices for the formal validity of any declaration of obligation contained in a bill, that the law of the place where the declaration is delivered should be observed."

But even if we hold fast to the rule of the German group, the internal state should also accord to the subjects of other nations the right to draw bills according to their own national law.

III. *The place which the instrument itself states to be the place of execution will be taken as such.*

This rule has been much opposed and, indeed, it is open to question. Some hold that the actual place of execution is alone authoritative (Staub, p. 216). But the practice is otherwise. A bill drawn in Germany, though dated from London, is considered valid if in accordance with the English, though not with the German law. The venue is taken to be, not the expression of a fact, but a declaration of the will (Ger. Imp. Ct., xxxii, p. 117). Grünhut (ii, p. 572, note 14) favors the rule only in behalf of *bona fide* third purchasers. Still, this is hardly a practical distinction. If we accept the rule as stated above, all parties may rely upon the validity of the act as founded either upon the law of the place of execution or the place given in the instrument as such.

IV. *By taking over the assets and liabilities of a business, the obligations by bill of the former debtor pass to his successor.*

1. Such a proceeding constitutes a kind of universal succession as to obligations, and as the heir becomes liable, so also does the new owner under the Law of Bills by virtue of the signature of his predecessor (*A. E.*, xix, p. 262).

2. The question whether the former debtor is thereby released will not be discussed here.

In America and England

The rule of the German group, stated at II, is that adopted also by Art. 72, 1, *b*, of the English Bills of Exchange Act so far as the foreign country in which the bill has been negotiated is England (see *supra*, § 182, III). The English rule seems also to be the principle adopted by the American cases. Thus, where a draft drawn in Illinois, accepted for accommodation in New York and payable in New York, was discounted in Illinois, it was held that the liability of the acceptor to a *bona fide* holder for value, before maturity, was governed by the law of Illinois (*Tilden v. Blair*, 21 Wall. 241; *Bank v. Sutton Mfg. Co.*, 6 U.S. App. 312).

The rule as stated at III is also followed in these Jurisdictions under the principle of the law of evidence as to parol proof (*Towne v. Rice*, 122 Mass. 67). But the rule does not apply to accommodation paper and paper with notice. In these cases the real place of the transaction may be shown (*Fant v. Miller*, 17 Grat. 47; *Overton v. Bolton*, 9 Heisk. 762).

§ 187. The Principal Obligations by Bill or Note considered separately.

I. *The prevailing theory is that the law of the place at which each obligation is undertaken will regulate it.*

1. We have now to discuss what system of law is applicable to determine the scope and effect of the various obligations undertaken by bill or note, and to the conditions and requisites necessary for the creation of the obligations. It was held in early times that all obligations under a bill were subject to a single system of law, viz. that of the place of payment. There was supposed to be an urgent necessity that only *one* system should be applicable to all successive regress actions, no matter where brought (*Seuffert*, ii, No. 252). It may be said with some force (*v. Bar*, ii, p. 169) that the different obligors on a bill are in a manner tied

up together, and that the later obligor would not take the bill and hand it on with his guaranty on it, unless he had the right of recourse against his predecessors. This expectation may be deceived, if this right of recourse is excluded by the law of a prior obligor, while *he* must be liable by the law of his obligation. Brocher ("*Cour de dr. i. privé*," ii, p. 314) also favors this view. But it is no longer the prevailing rule; in fact, it is dangerous to refer each obligation to the law of the acceptor or drawee, for the reason that at the time of drawing the bill, the obligation of the acceptor has not yet been fixed. The law of the acceptor should not be considered as that of the general place of performance. The obligation of the acceptor is not the central one; each transaction upon the bill must be kept separate.

2. To this effect also is Art. II of the project advanced by the Institute (*Annuaire*, viii, p. 121):—

"II. *Les effets de la validité de la lettre de change et du billet à ordre, des endossements, de l'acceptation, de l'aval, se jugent d'après les lois de chacun des pays où ces différents actes sont faits, sans préjudice des règles relatives à la capacité des signataires des titres.*"

3. Accordingly, it should not be taken as surprising that obligations arising out of the same bill are subjected to wholly different systems of law. A person who enters into an obligation by bill is presumed to take into consideration only the law of the place where he executes it.

II. *The principle as stated accords a simple method of determining the legal position of persons obligated on bills and notes.*

1. The drawer of a bill payable to his own order is obligated in like form even though he indorses it in another country, as the principal liability is in his capacity as drawer (v. Bar, ii, p. 163, note 35).

2. As to the liability of the drawer generally, the question for determination will be as to when and in how far a right of recourse against him exists. According to the main principle, he cannot be taken as desiring to bind himself to any greater extent, or on any other conditions, than provided for by his own law. If the bill be not paid, the recourse sum will be the value of the sum mentioned in the bill at time of maturity, at the domicile or place of business of the drawer (Ger. Imp. Ct., xlv, p. 156).

3. The place of executing the indorsement will apply to the liability of the indorser, *i.e.* : —

- (a) to the transfer of rights involved therein ;
- (b) to liability under the strict Law of Bills and especially the conditions under which there will be a right of recourse.

This becomes a practical question where a distinction is made between protested and other overdue bills. The German statute (Art. 16; followed in Servia and Switzerland) provides that a right of recourse for the payment of a protested bill exists only against those whose signatures were placed upon the bill prior to protest, while in the case of other overdue bills, the right of recourse exists also against indorsers after the period within which protest could be made.

In the case of blank indorsements, the law of the place of execution, *i.e.* usually the domiciliary law of the indorser, governs (Ger. Imp. Ct., xxiv, p. 115).

Conflicts are apt to arise for the reason that the laws relating to indorsements vary. Each indorsement is a new bill formally and physically connected with another one, the original bill, and based upon it. The principal function of the indorsement is the transfer of rights; to this is added a secondary one, in that the indorser undertakes the obligation of the drawer. These two phases should not be separated. Therefore, as a matter of law, the only legitimate holder of a bill is one who can prove an uninterrupted chain of indorsements between the payee and himself. This is as true of a note as of a bill. It is expressly so provided in some of the statutes (Ger., Art. 36; Sw., Art. 755). Where there is a gap, there will be no right under the bill as against the drawer and indorsers prior to the gap. Neither will the holder have any recourse against indorsers subsequent thereto. It is not to be denied that the examination of this question (and also whether the bill was properly indorsed by the payee) will not be wholly easy where the bill has been negotiated from places such as China, Alexandria, or Damascus.

The English Law of Bills, however, follows a different rule. The Bills of Exchange Act (§ 55, No. 2, c) provides that an indorser may not deny, as against his immediate or a later indorsee, that the bill was valid and legal at the time of his indorsement and

that he then had a good legal title thereto. It may thus be concluded that according to English law, where recourse is had against an indorser, he may not rely upon a gap in the chain. It is claimed by Phillimore (iv, § 850) that an indorsement is legal if so regarded at the place where the paper was issued, even though not permissible by the law of the country where the indorsement occurred.

4. Neither is the liability of the acceptor greater than provided by his own law. It is a question whether he may rely on the drawer's law if that enacts a lesser liability. The liability of the acceptor does not in itself depend upon the validity of the drawer's obligation, as the other parties did not enter upon the bill with the condition that the drawer had validly obligated himself. Swiss law (Arts. 801-802) is different from the German, as a presumption of genuineness is made. Suppose a German in Berlin draws a bill for M. 3000, which, after delivery, is altered to M. 30,000, and as such accepted by a Switzer in Zurich; the acceptor and indorsers would, pursuant to Art. 802, be liable for the larger sum. According to the decision of the German Supreme Court of Commerce (xxiii, p. 339) such a paper would not be recognized as a bill even for the smaller sum. It is true that M. 3000 is included in M. 30,000, but the alteration has really substituted a new obligation, the original one vanishing.

The Imperial Court (xliii, p. 86) formerly held that a bill could not be drawn on several persons. This was not followed by the court in joint senate however. It is now held that several persons may be called upon jointly for payment (though not alternately or successively); the drawer or indorser undertakes that the payee or indorser shall have the drawees jointly obligated (*D. Juris. Z.*, 1900, p. 441; *Imp. Ct.*, xlv, 46, p. 132).

The acceptor will be liable under an acceptance not written upon the bill itself, if the law of the place of the acceptance recognizes such a liability. This is not the case in Germany (Art. 21) or Switzerland, though in America, written contracts, including acceptances, can be validly made by telegraph (Meili, "*Telegraphenrecht*," 2d ed., p. 88). Italian jurists have also favored this view, e.g. Serafini in his "*Il telegrafo in rel. alla giurisprudenza civile e commerciale*" (p. 42). Dicey says (pp. 604-605):—

"By the law of Illinois a verbal acceptance is valid. A bill drawn in London on a town in Illinois is verbally accepted there. The acceptance is valid."

In America and England

The case referred to by Dicey is *Scudder v. Bank*, 91 U.S. 406. The authority of this case would seem to have been somewhat impugned by the later case of *Hall v. Cordell*, 142 U.S. 116, in which an Illinois merchant agreed orally in Missouri to accept and pay at his place of business in Illinois, all drafts drawn on him for goods to be shipped to him by the drawer from Missouri. By the laws of Missouri, this agreement was required to be in writing; by the laws of Illinois, it was not. The court decided the case upon the principles applicable to *contracts*, saying that "nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance." But the two cases can be distinguished in that, in the latter, the promise was intended to operate in the future upon bills not yet drawn, and, therefore, could not in any event be considered an obligation by acceptance, attaching to the bill itself.

By the Uniform American Negotiable Instruments Law (§ 223, N.Y. text) "an unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value." At common law, an oral promise was sufficient (*Dull v. Bricker*, 76 Pa. St. 225; *Jarvis v. Wilson*, 46 Conn. 91). As authority for the proposition stated by the author that a telegraphic authority is sufficient, see *Johnson v. Clark*, 39 N.Y. 216; *Bank v. Garretson*, 51 Fed. Rep. 167; *Bank v. Lynch*, 52 Md. 270. It has been distinctly held in New York that the promise to accept is governed by the law of the state where it is made, notwithstanding it is to be performed elsewhere (*Scott v. Pilkington*, 15 Abb. Pr. 280).

Conformable to the Continental rule, each party who puts his name to negotiable paper incurs a distinct and several liability, and whether as principal or surety, he is governed by the law to which his particular engagement is subject (Wharton's "Conflict of Laws," § 449, and cases there cited). This rule is embodied also in the English Bills of Exchange Act, Art. 72, 2, except that where an

inland bill is indorsed in a foreign country the indorsement is interpreted as regards the payer by English law.

§ 188. Agency in the Law of Bills and Notes.

I. *The normal relationship of principal and agent is governed by the principles stated under Civil Law.*

A legally authorized agent who signs a bill as such for his principal does not become personally liable, as modern systems recognize the principle of direct representation. Accordingly, where a bill is subscribed by a true agent in the name of his principal, it is the latter who is obligated, and it is not necessary that the drawer, indorser, acceptor, or surety should himself sign the instrument.

II. *The liability of an unauthorized agent (falsus procurator) is determined by the law of the place where the particular transaction took place. Where juristic persons are the unauthorized agents, the law of their seat is applicable.*

1. Where the unauthorized agent adds his name to that of the supposed principal, his liability is direct and pursuant to the Law of Bills. The liability is thus greater than that provided by some laws in the case of unauthorized agency, as it is sometimes restricted to the actual damage sustained or negative interest in the contract (compare Ger. Civ. Code, § 179, with Stat. of Bills, Art. 95).

2. Where the unauthorized agent signs simply the name of the principal, he is also liable directly for the amount of the bill, but not in the manner prescribed by the Law of Bills (see § 183, *supra*). As a proper signature is lacking here, one of the requisites of the statute falls away.

3. The basis for liability under Civil Law is by no means regarded everywhere as a tort, and therefore we cannot state the rule theoretically in the formula of *lex delicti commissi*.

In America and England

Where a duly authorized agent adds to his signature words indicating that he signs for or on behalf of a principal, he will not be liable on the instrument, but the mere addition of words describing him as agent or as filling a representative character, without disclosing the principal, does not exempt him from such liability

(Uniform American Negotiable Instruments Law, § 39; English Bills of Exchange Act, § 26).

The law as to unauthorized agency, as stated by the author at II, 2, is followed also in these Jurisdictions (*Miller v. Reynolds*, 92 Hun 400). His warrant of authority as implied by English law does not pass with the transfer of the instrument expressly assigned (*id.*).

§ 189. Suretyship in the Law of Bills and Notes.

I. *Here again, the law of the place of entering into the obligation, usually the domicile of the surety, will govern.*

1. Where the authoritative law contains no provision as to suretyship by bill (*Aval*), it does not follow that the act is invalid or that it has no effect pursuant to the Law of Bills. Reference must be had to universal usage and to the will of the parties. By using the form of the bill, they must have intended an effect under the Law of Bills (*A. E.*, vii, p. 12).

2. Suretyship by bill must, as a rule, be regarded as an independent obligation within the Law of Bills.

- (a) There must exist a drawer of the bill in order to undertake suretyship (Ger. Imp. Ct., x, p. 1).
- (b) It is not necessary that there be a legally binding obligation of the principal debtor unless the authoritative system of law, viz. that of the place of entering into the guaranty, so requires.

Reference may be had to the following statutes:—

Art. 275, Italian *Codice di com.*: "The surety becomes responsible for the obligations of the person for whom he guaranteed and is obligated in the manner of the Law of Bills, even though the obligation for which he stands security is not legally binding."

Art. 47, Hungarian Stat. of Bills, provides that the surety by bill remains liable, even though it is proven that the principal debtor lacked capacity to be obligated by bill.

Art. 497, Japanese Code of Commerce: "Whoever places his name upon a bill, a copy of a bill, or elongation thereof, is subject to the same liability as that of a principal debtor, even though the obligation be invalid."

II. *A surety who signs a bill payable at a particular place voluntarily subjects himself to the particular system of law in force at the place of payment.*

NOTE

Suretyship by bill is unimportant practically. For many reasons, indorsement has taken its place. See also § 111, *supra*.

§ 190. "Domiciled" Bills.

I. *By "domiciling" a bill, the application of the law of the bill is effected.*

1. By the laws of the German group, a "domiciled" bill or note is one in which a place of payment is mentioned differing from the domicile of the drawee of the bill or maker of the note (see Ger. Stat., Art. 24; Sw., Art. 743). The term "payable at the office of Brewery X" is sufficient as a designation of the "domicile" (Ger. Imp. Ct., i, p. 17).

2. When a bill is thus domiciled the following conclusions are drawn by customary law:—

- (a) that the maker of a note or the acceptor of a bill have declared that they will pay only at the place mentioned;
- (b) that a forum has been voluntarily designated in addition to the normal one (*A. E.*, v, p. 18; vii, p. 11);
- (c) that a submission to the law of the designated "domicile" has taken place. The German Imp. Ct. (vi, p. 25) holds that the "domicile" has thus been fixed as the seat of the obligation, and that it is by the law of that place alone that the obligation is to be determined. The theory of Savigny still shows its influence in this decision, whereas the Swiss Federal Court (v, p. 21) arrives at the same conclusion by taking the designation of a "domicile" as a voluntary submission to the law of that place.

II. *The principle as stated applies to the obligations of all the obligors upon the bill, including also that of a surety.*

III. *The statutes frequently state that for notes, the place of making a note, and for bills, the address given as that of the drawer shall be taken presumptively as the place of payment. These are to be distinguished from the "domicile" of the note or bill.*

1. Such provisions are to be found in the German statute at Art. 4, No. 8, and in the Swiss at Art. 826. They neither affect the forum nor the system of law applicable. Promissory notes usually mention no place of payment, and therefore the legislator has inserted the above provision so as to make them valid without it (Imp. Ct., viii, p. 71; *A. E.*, xvi, p. 819).

In the same way, bills drawn under Art. 6 of the German Statute and Art. 724 of the Swiss Code, which provide that a bill can be drawn by the drawer against himself only in case a place of payment different from that of drawing is mentioned, cannot be interpreted as "domiciled" bills. Such instruments are at base really notes (Ger. Sup. Ct. Comm., iii, p. 8).

2. The same reasoning applies in the case of ordinary bills, as frequently no particular place of payment is mentioned (Ger. Sup. Ct. Comm., iii, p. 8).

IV. *As to the duty of protest and the effect of not protesting, see Art. 43, German Statute, and Art. 746, Swiss Code.*

In America and England

The result of the rule as laid down by statute in countries of the German group is reached also in *America* by the principles generally applicable to the interpretation of contracts. We are here dealing with the *interpretation* of the obligation of parties to a bill, not, as at Supplement to § 187, *supra*, of the valid *existence* of the obligation as such. By the general rules applicable to contracts, where the place of performance of a contract differs from that of the obligor's domicile, or of the solemnization of the instrument, the law of the place of performance prevails upon the terms of performance. Thus the law settling the obligations of the acceptor of a bill is determined by the place where the bill is made payable (Cox v. Bank, 100 U.S. 704; Everett v. Vendryes, 19 N.Y. 436; Freese v. Brownell, 35 N.J. L. 285; Sylvester v. Crohan, 138 N.Y. 494).

The rule in *England* is different by reason of the terms of Art. 72, 2, of the statute. It refers all questions of "interpretation" to the *lex loci contractus*, except in the case of inland bills. Dicey (p. 607) suggests that the terms of the statute have resulted from a misinterpretation of language used by Story in his "Commentary on the Law of Bills of Exchange" (§§ 153-154).

§ 191. Purely Formal Provisions relating to Bills and Notes.

I. *At least the provisions of the lex loci actus must be observed in regard to formalities.*

1. Art. 86 of the German statute (Art. 824, Swiss Code) provides that "the form of transactions for upholding or putting in

force rights created by a bill, which may be carried out abroad," are determined by the foreign law. Where the authoritative system of law, as developed by our prior discussion, requires that an act be undertaken at a foreign place "for upholding or putting in force rights created by a bill," *e.g.* a protest, that act will be governed, both as to its form and as to the locality and time at which it is to be made, by the law of the place where it is to occur. The act of protest will occur at the domicile of the principal obligor (*i.e.* at the place of payment), as the protest refers to the non-fulfilment of his (the acceptor's or maker's) obligation.

2. The tenor of statutes of the German type makes the rule *imperative*, so that here the maxim of "*locus regit actum*" is not permissive, as we have seen it to be in other divisions of the law (see § 55, *supra*).

II. *The formalities must be strictly observed.*

1. Formalities as to the protest refer either to:—

- (a) the external form,
- (b) the contents, or
- (c) the protest period.

Regarding a, the principal differences between the statutes are that in some countries (Germany, France, Switzerland) the protest has retained its old solemn character, stating in detail the presentment of the bill for acceptance and payment and the answer of the presentee. In Germany, protest must be made by notary or court officer under his seal (Arts. 87 and 88); in Switzerland, by notary or other person authorized by the government (Art. 814); a seal is not prescribed. In Belgium a short form prevails, and protest can be made through the post-office.

Regarding b, the statutes prescribe what a protest is to contain (French *Code de comm.*, Art. 174; Ital. *Codice di comm.*, Art. 305; Ger., Art. 86; Sw., Art. 815). The form varies, though the statutes do not state that a protest not in the exact style shall be void. It is therefore necessary to examine whether the defect is essential according to the particular law applicable (German Sup. Ct. Comm., i, p. 144). Thus the question may arise whether the presentment must be expressly mentioned. In France it must be (Art. 174, *Code de comm.*); in the German group it need not (Art. 88, Stat. of Bills). Again, it is disputed whether the name of the presentee

must appear. The German Supreme Court of Commerce has held that it must (xiv, p. 161). Where the party obligated for payment is a juristic person, it seems that the name of the natural person to whom the bill was actually presented need not appear (Thöl, 4th ed., § 89).

As a matter of legislation it would certainly seem advisable to simplify the unwieldy forms still in vogue. G. Cohn favored this policy most energetically in the Thirtieth Annual Report of the Berlin Legal Society.

Regarding c, the law of the place from which the bill was emitted may determine the days of grace and the period for protest. This it may do even for bills already drawn, provided they are to fall due in the future. But no change can be made that would operate to alter the date of maturity. In practice it will not be difficult to distinguish those cases where the purpose is not merely to smooth away formal difficulties, but really to give the acceptor time for payment. This question gave rise to considerable discussion on the occasion of the enactment by France, during the war of 1870-71, of letters and decrees of grace applicable to commercial securities and commercial paper, by which a longer period for payment, or at least for protest, was accorded to debtors (see § 194, *infra*).

2. *Notice* of protest must be given if demanded by the law of the person against whom recourse is sought.

3. *Payment* must be made within the business hours and in the coinage prescribed by the laws of the place of payment. Of course the creditor by bill will not be bound by material changes in the value of the coinage made after the time that his rights have accrued.

In America and England

The law of the place of payment has been held applicable to the demand for payment (*Masson v. Lake*, 4 How. U.S. 262); whether days of grace are to be allowed (*Roquette v. Overmann*, 1875, L. R. 10 Q. B. 213, 535; *Pomeroy v. Ainsworth*, 22 Barb. 118); to the nature of the protest (*Ballingalls v. Gloster*, 3 East 381; *Aymar v. Sheldon*, 12 Wend. 439); to the notice of dishonor (*Bank v. Brown*, 1903, 83 N.Y. Supp. 1037; *Brown v. Jones*, 125 Ind. 375); to the formalities of the protest (*Bank v. Gray*, 2 Hill 227; *Ray v. Porter*, 42 Ala. 327).

Notice to prior parties, however, by an indorser whose liabilities are fixed is governed by the law governing the contract between them (*Roquette v. Overmann, supra* ; *Bank v. Green*, 33 Ia. 140).

§ 192. Conditions of Recourse.

v. Salpius, "*Über die Anwendung ausländischen Rechtes auf den Wechselregress*," *Z. für Handelsrecht, N. F.*, iv, pp. 1-66.

v. Bar, ii, pp. 165-170.

I. *Protest, whenever prescribed, is a solemnity which constitutes an absolute and material condition of recourse. Whether it be necessary is therefore determined by the law of the place where the obligation relied upon is undertaken.*

1. It has been claimed (von Salpius, cited *supra*) that protest is a mere formal solemnity, and therefore it is only essential when so prescribed by the law of the place of payment.

2. But this view is not correct and is not the prevailing opinion. Grünhut (ii, p. 582) properly states that when a person draws or indorses a bill under the jurisdiction of a system of law which prescribes presentment for acceptance generally, or within a given period, the obligation under the bill becomes subject to the condition, that if the holder neglects to present the bill for acceptance or payment, or does not establish the fact of non-acceptance within a certain period by protest, the obligation falls. These are not formal provisions; the protest is an absolute and material condition of recourse; therefore, the law which determines the necessity of protest and that which governs the instrument of protest itself are not the same. This is the German doctrine.

The Commercial Code of Brazil provides in Art. 424:—

"Litigation in matters of bills and notes relating to presentment, acceptance, payment, protest, and notice shall be decided according to the laws and commercial usages of exchange prevailing in the countries in which the particular acts were undertaken."

The German Supreme Court of Commerce (xix, p. 203) has held that this provision cannot be interpreted to mean that the effects of *neglecting* to protest should be determined by the law of the place where such protest should have been made. The same opinion is expressed by Rossel, "*Manuel de droit fédéral*," p. 881. It is the law of the place where the obligation relied upon was entered into which governs.

3. From the substantive necessity of protest we must distinguish everything that refers to the form, the place, and the time of making the protest; these are governed by the law of the place of payment.

II. Notice.

Notice of dishonor may affect all parties to the paper. The necessity of giving notice is governed by the law controlling the obligation of the person against whom recourse is claimed.

III. The results reached under the prevailing theory do not completely satisfy the demands of cosmic intercourse. The Institute of International Law has proposed the following (iv):—

“Les obligations du porteur au point de vue de la présentation pour l'acceptation et pour le payement sont fixées par la loi du pays où a été émis la lettre de change ou le billet à ordre.”

The purpose of this provision is in accordance with the idea that every obligation upon the bill, *including the conditions of recourse*, should be subject to *one* common system of law, viz. that of the place of issuing the bill or note.

§ 193. *Vis major* as an Excuse for Non-protest.

1. The presentment and protest of a bill is often spoken of as a legal duty of the holder; it is, however, in truth, a requisite or condition under which his predecessors have undertaken an independent guaranty for payment by the drawee. This obligation may naturally not be extended indefinitely and, therefore, presentment and protest in due time is one of the conditions. The question is this: whether in international matters a plea should be allowed for a belated protest on account of *vis major*, consisting of an act of God, the passing of a moratory law, or a quarantine.

The doctrines of the various states differ.

(a) *The French system* does not consider the objective fact of delay alone, but inquires as to whether the delay has been caused by the *subjective conduct of the holder of the bill* (Pardessus, “*Droit commercial*,” ii, No. 4269).

(b) *The English and American system* is the same; the holder does not lose his rights if he can prove that, because of illness, a war, or other hindrance for which he was not responsible, he was prevented from fulfilling his duty. See the American Uniform Negotiable Instruments Act (N.Y. text, § 267).

(c) The uniform Statute of Bills of *Denmark, Sweden and Norway*, in force since 1881, is also to the same effect.

(d) The practice of *Austria* and of *Italy* is in accord.

(e) *The German system*. The Statute of Bills does not expressly decide the matter, and a controversy has therefore arisen upon the point. Bluntschli favors the plea of *vis major* in his work on the statute (p. 83), but adds that it must exist absolutely and in fact. On the other hand, the Supreme Court of Commerce (i, p. 288) has held that it is not an excuse.

(f) The *Swiss Code of Obligations* (Art. 813) expressly provides that *vis major* shall not excuse. No inquiry may be made as to the guilt or innocence of a party where he has in fact neglected to observe a formality or a prescribed period.

2. The Institute of International Law proposes (*Annuaire*, viii, p. 115) that *vis major* shall be an excuse, if the cause were a general one, such as an inundation, a war, etc.

As there is no uniform provision, a person may be liable to a subsequent party, by way of recourse, according to the law governing *his* obligation, and yet not be able to have recourse against his predecessors. This is a hardship but it cannot well be avoided.

§ 194. Extra-territorial Significance of the French Moratory Laws.

v. Bar, ii, pp. 174-178.

Goldschmidt's *Z.*, xvii, pp. 294-309; xviii, pp. 625-643.

Norsa, "*Sul conflitto internazionale delle leggi cambiarie*" (Milan, 1871), *Revue de dr. i.*, viii, p. 470.

Munzinger and Niggeler, *Rechtsgutachten betreffend die durch die prorogierenden Gesetze und Dekrete der französischen Behörden hervorgerufenen Regressfragen* (Berne, 1871).

Fick, *Über internationales Wechselrecht in Beziehung auf Fristbestimmungen, insbesondere die französischen Wechselmoratoriumsgesetze und Dekrete* (1872).

Jaques, *Die durch die französischen Moratorien-Verfügungen hervorgerufenen Regressfragen* (Vienna, 1872).

I. *If we accept the view that the protest of a bill or note is a condition sine qua non to recourse, the laws passed in France in 1870-71 could not prevent the loss of the right of recourse.*

1. During the Franco-German war the French government extended the period of payment of commercial paper then outstanding by one month, and later successively by several months. In one

since the law speaks of a postponement of the date of maturity, another, of the period of protest, and finally protests are entirely prohibited. The question then arose as to whether these laws had validity also as against persons not subjected to French law, especially whether an action for recourse was maintainable against drawers and indorsers domiciled without France, where the bills were accepted by Frenchmen, presented at maturity but not protested.

2. The German Supreme Court of Commerce (i, p. 288) held a great determination that these laws were not binding in Germany and pointed to the strict conditions of the guaranty. Similar decisions were made in other countries (Fick, p. 112).

II. *A different result is reached if the protest is considered a matter of form.*

To this effect were the decisions of the Austrian courts.

If these laws had referred only to days of grace, the law of the place at which the paper was presentable for payment would surely have been held to govern, but as it was, they practically affected to change the obligation of the obligors.

§ 195. Law of Markets and Fairs in Connection with Bills and Notes.

Special laws applicable to markets and fairs (see § 122, *supra*) must be consulted in connection with bills issued in the course of business of a market or fair. From the historical point of view, it may be noted that, as fairs formerly constituted the radiating points of trade and finance, they facilitated to a large extent the transaction of business by bills and notes.

I. *Bills issued at markets and fairs are subject to the laws governing the particular market, even in regard to questions of capacity.*

See Art. 84, German Stat.; Art. 822, Swiss Code.

II. *Further influences upon the Law of Bills.*

1. A bill made payable at a market or fair sufficiently denotes the time of payment (Ger. Stat., Art. 4; Swiss Code, Art. 722).

2. In the case of an ordinary bill, the holder is entitled to present it at once for acceptance, whereas in the case of a bill payable at a market or fair, he may present and protest it only at

the time provided by the laws of the place of the market or fair (Ger. Stat., Art. 18; Sw. Code, Art. 736).

3. The date of maturity is also determined by the laws of the place of the market or fair; in the absence of any such designation, it will be the day before the legal closing of the market or fair (Ger. Stat., Art. 35; Sw. Code, Art. 754).

III. *The laws of a bourse or exchange may be of importance in regard to bills, if the parties have agreed that presentment for payment or acceptance, protest, etc., shall occur there.*

See Art. 91, German Stat.; Art. 818, Swiss Code.

§ 196. Procedure and Execution.

I. *The right to a strict procedure is determined by the lex fori.*

1. In some jurisdictions, privileges of procedure are accorded actions upon obligations of the nature of a bill. The question whether this strictness shall be applied is closely connected with the obligation itself. Yet the requisites for its application are generally so wrapped up with the system of procedure in a given state that these requisites must be applied also to obligations by bill entered into abroad. Even though quick process upon a bill would not be permitted in the foreign country, it should nevertheless be granted if the rules of the *lex fori* permit of it.

2. In Germany, special process is stated by the terms of the law to apply to claims arising out of commercial paper within the meaning of the Statute of Bills (§ 202, Stat. on Civ. Proc.). The Imperial Court, however (ix, p. 437), has extended this to foreign commercial paper, provided it be recognized as such by the laws of the place where issued.

II. *The right of arrest is also governed by the lex fori.*

1. The right to arrest for obligations by bill or note no longer exists by the laws of France, Germany, or Switzerland. Upon principle, it may be stated that the nature of execution is determined by the *lex fori*. It follows, then, that if the law of the place where the debtor is sued permits a body execution, it will issue, even though his obligation was entered into at a place where it is not permitted.

2. The right to strict process is usually made dependent upon enrolment in the Commercial Register.

§ 197. Questions of Proof.

v. Bar, ii, p. 183.

I. *Proof of a lack of capacity must be made by the party alleging it.*

Theoretically, the existence of capacity forms the basis of all actions upon bills and notes. As a matter of practice, however, capacity is presumed, and the defendant has the burden of proving a lack of capacity.

II. *The question as to who has the burden of proving the foreign law cannot be determined by a uniform principle, but is dependent upon the circumstances of each case.*

1. An action brought upon a bill drawn or indorsed and protested in a foreign country is to be granted strict procedure, if the same conditions existed there as are necessary for such process in the inland (Seuffert, ix, No. 2). The defendant has the burden of proving that by the foreign law such process is not permissible.

2. Where an action is maintainable on a bill or note by the foreign but not by the local law, the plaintiff must prove the existence of the foreign law.

III. *Whether proof must be given that can be instantly verified ("liquid" proof) and whether set-offs are formally permissible in actions on notes and bills are questions of procedure governed by the lex fori.*

§ 198. Limitations of Actions on Bills and Notes.

I. *Pursuant to what has been said under International Civil Law (§ 56, supra), the law governing each obligation upon a bill will determine when the right of action thereon expires by the statute of limitations.*

II. *Here, too, the English and American doctrine is contrary to that of the Continent of Europe in that the lex fori governs.*

1. The outlawry of actions on bills (as upon other causes of action) is not considered a mere matter of procedure on the Continent of Europe, but as a substantive ground for the obligation to cease. It follows from this that it is governed by the laws of the place to which the legal relationship as a whole is subject (Ger. Imp. Ct., vi, p. 25; ix, p. 225).

This result is not altered by the fact that a system of law which

regards it as an institute of procedure may be applicable to the obligation as a whole. The judge cannot be influenced by this circumstance to apply the internal law to a case in which it is not properly applicable by international rules (Imp. Ct., ii., p. 13). In the case just cited, the German court applied the six-year rule of the State of New York to a suit brought upon a promissory note, although the law of that State regards the statute of limitations as affecting the remedy only. Compare § 56, I, *supra*.

2. In the case of "domiciled" bills, the statute of limitations at the place of "domicile" is applicable.

3. Where French law comes into question, a peculiarity must be noted. The *Code de Commerce* (Art. 189) provides a uniform limitation of five years for obligations by bill; but this changes to the normal rule of thirty years (*Code civil*, Art. 2262) provided that:—

- (a) there has been "*une reconnaissance par acte séparé*"; it is essential that recognition of the obligation occur by an act in writing; payment of interest or part payment will not suffice; these merely interrupt the running of the five-year statute;
- (b) there has been "*une condamnation*"; here the obligation has been merged in the judgment of the court.

A person obligated by bill under French law can rely upon the statute of limitations in a foreign country only by taking an oath as provided in Art. 189 of the *Code de Commerce* that he no longer owes anything thereon.

III. *Even though actions under the bill or note have become outlawed by limitation, the parties may have other rights following the usual rules.*

This applies, for instance, to the relationship between a surety upon the bill (*Avalist*) and the principal debtor.

Actions for enrichment maintainable in the case of dishonored bills against drawer or acceptor are grounded upon the usual rules in private law, though affected also by rules of the strict Law of Bills. These actions become outlawed by the usual rules of International Civil Law, the statute beginning to run, not from the date of maturity, but from the time of dishonor.

§ 199. Checks.

I. *The contract with the bank, prior to the drawing of checks against it, is subject to the general rules of the Law of Obligations.*

1. The check contract, in contradistinction to the check itself, is not one merely of mandate, but a contract *sui generis* (Cohn, in Endemann's "*Handbuch des Handelsrecht*," iii, p. 1148). Cohn defines this contract as that by which one of the parties undertakes to honor orders of payment drawn by the other party in accordance with certain regulations, either to a certain or an indefinite amount. An important element is the right which the contract gives to divide up the sums according to convenience.

2. The customers drawing the checks are subject, in their dealings with the bank, to the law which governs it; the contract therefore also becomes subject to that law (with the exception of the question of capacity). This law will determine how far the customer is liable for the acts of his servants and whether the bank has fulfilled its contractual duty in the examination and control of signatures to the checks (see Thaller, *Annales de dr. commercial*, xiii, p. 39).

II. *The check as a formal instrument is governed by the laws of the place of issue (i.e. usually the domiciliary law of the drawer).*

There are a number of divergences in the laws of the different states relative to the nature and requisites of a check. Thus in England and America it must be drawn upon a bank or banker. In Italy and Portugal it must be drawn upon a bank or merchant. In France, Belgium, Switzerland, and Spain there is no limitation as to the drawee. Again, the laws of Scandinavia and Switzerland require that the word "check" appear upon the face of the paper. In Austria and Argentine it must be drawn upon a blank form.

In determining the legal nature of the instrument, the law of the place of issue will govern. It has been held in some jurisdictions that the dating of the note will be authoritative. Thus an instrument dated from London, though written in Switzerland, will be formally valid as a check, though the word "check" does not appear upon its face (*Revue der schweiz. Gerichtspraxis*, xviii, No. 65).

III. *The right of recourse against the drawer of a check is governed by the law of the place of issue (usually the domiciliary law of the drawer).*

1. This is an important rule as some countries regard the check simply as an order, and not as an instrument in the nature of a bill (Ger. Imp. Ct., xlv, p. 158). According to this doctrine, the

holder of a dishonored check cannot proceed upon the instrument itself against his predecessors in title or the drawer. It is precisely this right of recourse which is the point of distinction in German law between a bill and an order. Accordingly, the holder must rely upon the obligation for which the check was given; usually his rights will be only against his immediate predecessor.

2. The foreign law of the place of payment is not the standard. It is important to note here (as in the matter of the drawee's obligation upon a bill) that the substance of the drawer's liability does not represent actual performance of the instrument, but is simply payment of the recourse sum.

IV. *The ex-contractual effects resulting from forged or fraudulent checks are determined by the lex delicti commissi.*

1. The forging or altering of a check is to be considered from the standpoint of the place where the wrongful act physically occurred, and not of the place where the deception was finally accomplished.

2. The *lex delicti commissi* is also authoritative in determining whether a third party shall be held liable for ex-contractual damages, e.g. a bank for neglecting proper surveillance over the acts of an employee.

3. The question whether a bank which has been deceived by a forged or fraudulent check has been guilty of negligence on its part and therefore shall be compelled to bear the loss itself is likewise governed by the *lex loci*, which will, as a rule, be the law of its own seat (see Holdheim's "*Monatschrift für Handelsr. u. Bankwesen*," viii, 1899, pp. 85 *et seq.*).

NOTES

1. The principal Continental author upon checks is G. Cohn (Zurich). His works and other publications on the same topic are cited in my book on "Comparative Jurisprudence" (p. 222). Cohn favors a uniform international law of checks.

2. Although modern legislation has frequently dealt with the subject of checks, no statute (with the single exception of the Argentine Commercial Code, Art. 810) has impressed a special duty of diligence or liability upon bank customers in regard to forged or fraudulent checks. See my opinion upon the laws relating to forged checks in Holdheim's *Monatschrift für Handelsr. u. Bankwesen*, vii, 1898, p. 202.

MARITIME LAW

LIST OF SPECIAL AUTHORITIES

A. Works dealing with International Private Maritime Law

- v. Bar, ii, pp. 185-230; *Lehrbuch*, pp. 138-144.
v. Kaltenborn, *Grundsätze des praktischen europäischen Seerechts, besonders im Privatverkehre*, i and ii (1851).
R. Wagner, *Handbuch des Seerechts*, i, pp. 128-143.
E. Boyens, *Das deutsche Seerecht*. Commentary by Dr. William Lewis on the Foreign Law, i (1897), ii (1901); vol. i, p. 16, on the Local Application of Maritime Laws.
A. de Courcy, *Questions de droit maritime*, 1st series (1877), 2d series (1879), 3d series (1885), 4th series (1888).
Desjardins, *Traité de droit commercial maritime*, i-viii (1878-89).
E. E. Wendt, Papers on Maritime Legislation with a Translation of the German Mercantile Laws relating to Maritime Commerce (3d ed., 1888).

B. In Regard to International Public Maritime Law

- A. Le Moine, *Précis de droit maritime international et de diplomatie* (1888).
F. Perels, *Handbuch des allgemeinen öffentlichen Seerechts im Deutschen Reiche* (1884).
Id., *Das internationale öffentliche Seerecht der Gegenwart* (1882).
Störk, in v. Holtzendorff's *Handbuch des Völkerrechts*, ii, pp. 483 et seq.
Carlos Testa, *Le droit public international maritime. Principes généraux, règles pratiques. Traduction annotée et augmentée de documents touchant la contrebande de guerre, la neutralisation des mers et des fleuves et la décision de la conférence africaine* (1885) en matière de droit maritime par Ad. Boutiron (1886).
Pradier-Fodéré, *Traité de droit international public européen et américain*, v, Nos. 2262 et seq., Nos. 2471 et seq.

C. In Regard to the History of Maritime Law

- Desjardins, *Introduction historique à l'étude du droit commercial maritime* (1890).
E. Cauchy, *Le droit maritime et international considéré dans ses origines et dans ses rapports avec les progrès de la civilisation* (2 vols., 1862).
L. B. Hautefeuille, *Histoire des origines, des progrès et des variations du droit maritime international* (2d ed., Paris, 1869).

D. Periodical

- Revue international du droit maritime*. Published by Autran (since 1885).

E. Collections

Pardessus, *Collection des lois maritime* (6 vols., 1828-45).

F. de Cussy, *Phases et causes célèbres du droit maritime des nations* (2 vols., 1856).

§ 200. Introductory Remarks.

v. Bar, ii, pp. 185 *et seq.*

De Courcy, i, p. 71; ii, p. 127.

I. *Maritime Law* ("disciplina navalis") was formerly regarded as an internationally uniform system.

1. The recognition of the fact that the doctrines upon this topic differ in the various countries is of comparatively modern origin.

2. Of course the conditions of sea voyages have changed. The same ship frequently takes in cargo at widely separated ports and travels between the most distant and dissimilar countries.

II. *Strenuous efforts have been made for the establishment of a universal maritime law among the civilized states. The movement should be actively supported.*

1. The York and Antwerp Rules.

Report of the Fifth Annual Conference of the Association (1877), pp. 80 *et seq.*

Lewis, in Goldschmidt's *Z.*, xxiv; *N.F.*, ix, pp. 491-524.

Voigt, *Die neuen Unternehmungen zum Zweck der Ausgleichung der Verschiedenheiten der in den Seestaaten geltenden Havarie grosse- und Seefracht-Rechte* (1882).

E. van Peboorgh, "*Des règles d'York et d'Anvers*," *Journal de dr. i.*, xiii, pp. 424-431.

De Courcy, 2d series, pp. 265-288.

Report of the Fourteenth Conference of the Association of International Law.

The Revised York and Antwerp Rules (i-xviii, at pp. 46 and 279).

2. The *Institute de droit international* adopted the following resolution at Turin (*Annuaire*, vi, p. 91):—

"The subjects upon which a uniform system of law is especially desirable are: bills of exchange and other negotiable instruments, contracts of transportation, and the principal divisions of maritime law."

The Institute agreed upon a uniform law of marine insurance, "*loi uniforme sur les assurances maritime*." It also worked out a project for the organization of an international tribunal of maritime prizes (*Annuaire*, ii, p. 153; see also pp. 113-130).

3. A *Comité maritime international* has attempted to unify the maritime laws of the civilized states (*Journal de dr. i.*, xxvi, p. 202; xxviii, p. 65; Boyens, in *Z. für das ges. Handelsr.*, vol. 48, *N.F.*, 23, p. 172; vol. 51, *N.F.*, vol. 36, p. 128). It is of interest to note that English jurists and maritime bodies also took part in these efforts.

[The Belgian government has proposed to the other Maritime Powers that diplomatic conferences be held to consider the draft treaties on Collision and Salvage adopted by the *Comité* at Hamburg in 1902. The British government has unfortunately refused to be officially represented at these conferences but subsequent to this refusal (June 18th, 1904) it was stated in parliament on behalf of the government that it would "take steps to inform itself of the proceedings" and would "consider in a most friendly spirit any proposals made by it which should be thought to be beneficial." — *Trans.*]

4. It may be said incidentally that by reason of the conclusion of the International Convention upon Railroad Transportation, the Swiss Commercial and Industrial Association was led to suggest that the central railroad bureau should prepare the whole subject of transportation on inland waters and on the sea for "discussion and conference." The association denies at the outset that Switzerland would not be the proper state to begin, because not sufficiently interested, and holds that "just because it has no direct interest should it deem itself called upon to take the initiative" (see my work on the "International Spirit of Modern Jurisprudence"). So far as I know, the central bureau has not yet taken up the matter.

III. *An unsatisfactory result is reached by submitting all cases of conflict in Maritime Law to the lex fori.*

1. The tendency in Maritime Law to refer so many problems simply to the *lex fori* may have originated from the former view that this branch of law constitutes a universally uniform system and therefore it is unnecessary to arrive at rules of conflict. But now an earnest opposition has arisen against the preponderance of the *lex fori*. At the International Congress of Antwerp, in 1885, the following resolution was unanimously adopted:—

"En cas de conflits des lois maritimes il ne faut pas appliquer une règle générale, mais distinguer suivant les cas."

2. Wagner's book on Maritime Law favors the *lex fori* and states that there exists a kind of presumption in its favor. See § 52, I, *supra*, for the contrary view.

3. It is interesting to note that the Imperial Court of Germany decided a case arising from the collision of two English ships in Russian waters according to German law (xxix, p. 90).

4. There are no proper practical grounds in favor of the *lex fori*.

IV. *There are no express statutory rules of conflict upon Maritime Law.*

Reference may, however, be made to certain provisions of the German Commercial Code.

"§ 515. If the master fails, when abroad, to obey the rules prevailing there, especially the police, tax and customs laws, he must replace the loss resulting therefrom."

See also §§ 483, 522, 901-905 (Limitations of Actions).

§ 201. The *lex patriæ* of Maritime Law (*la loi du pavillon*).

I. *The lex patriæ may be regarded as the main principle applicable to property in sea boats.*

1. Ships acquire a nationality through the observance of formalities on the part of their owners. They may then fly the national flag. The requisites are, as a rule:—

- (a) entry in a particular register;
- (b) ownership of the ship wholly or in part by citizens or residents of the particular state.

In some states (*e.g.* England, Germany) a ship registry is maintained similar to that for real estate, in which is entered:—

- (a) all facts which form a basis for the ship's right to the flag;
- (b) all facts which are necessary to fix the identity of the ship and which affect property relationships in connection with it;
- (c) the home port;
- (d) all changes made in regard to these facts.

2. Ships declared seaworthy at the home port are to be recognized as such abroad, unless the police regulations of the foreign port are expressly made applicable by special provision. In this way, therefore, we speak of the nationality of the ship. The term "floating building" is also used. In fact ships are subjected to much the same formal rules as are applied to real estate; "they

are like immovables of commerce" (Goldschmidt, "*Handbuch des Handelsr.*," 2d ed., ii, § 60).

3. The project of the Institute of International Law contains the following provisions (*Ann.*, vii, p. 124):—

"*La loi du pavillon du navire doit servir à déterminer :—*

1. *Quelles sont les formalités de publicité à remplir pour la transmission de la propriété.*
2. *Quels sont les créanciers du propriétaire du bâtiment qui ont ou n'ont pas le droit de suite, dans le cas où il est aliéné.*
3. *Si le navire est susceptible ou non d'être hypothéqué.*
4. *Quelles sont les formalités à remplir pour la publicité des hypothèques maritimes.*
5. *Quelles sont les créances garanties par un privilège maritime.*
6. *Quels sont les rangs de privilèges sur le navire.*
7. *Quelles sont les formalités à remplir par le capitaine qui emprunte à la grosse en cours de voyage. . . ."*

4. The Congress of Antwerp adopted the following sound resolution:—

"*La loi du pavillon régit en tous pays les différends relatifs au navire et à la navigation, qui se produisent entre les copropriétaires, entre les propriétaires et le capitaine, entre les propriétaires ou le capitaine et les gens de l'équipage.*"

II. *But the exclusive application of the lex patriæ is not desirable.*

1. This is particularly true in regard to rights of pledge. The law of France follows the theory that a pledge of a ship validly constituted in a foreign country according to the laws in force there, is not necessarily valid in France, when the ship happens to be in a French port (see *Journal de dr. i.*, i, p. 31; ix, p. 246). This represents the other extreme; it was probably to counteract this principle, that the Congress of Brussels and the project of the Institute favor the *lex patriæ* exclusively. Von Bar (ii, p. 198) opposes the conclusions of the Institute.

2. The law of the flag properly governs in regard to:—

- (a) the separate rights of joint owners of a ship; this is sound; the owners themselves may be of different nationalities and have different domiciles;
- (b) the right to effect a change of the flag; the property rights of the separate owners may be affected by this proceeding.

3. The law of the flag should also determine the rights and duties of the captain and crew as against the owner (v. Bar, ii, p. 226).

4. The conclusions of the Congress of Antwerp would seem to have gone too far in making the law of the flag always controlling as to the liability of the owner. The *lex loci actus* would seem applicable in the case of torts or *quasi-torts* through acts of captain and crew (*e.g.* injury done to another ship), for the same reasons as prevail in the case of torts done upon land.

§ 202. Maritime Mortgages.

v. Bar, ii, pp. 195 *et seq.*

I. *The law of the flag is primarily applicable to the creation of ship mortgages. It is immaterial whether or not the forms of pledge of the home state differ from those of the place where the ship happens to be, provided the pledge be entered in the ship register of the home state.*

1. The foreign law must recognize vested rights. The mere fact that the ship has entered the jurisdiction of a foreign state does not affect them. Ships of the sea usually return again to their home port after a period, be it greater or smaller, and have in a certain sense (as the Ger. Imp. Ct., xlv, p. 278, says) their seat there. A mortgage which has been created according to this law should be recognized abroad, even though created in a different manner in the foreign state. A mortgage created upon a ship in Holland, according to the law of Holland, was recognized in Germany, notwithstanding that the ship could have been distrained and sold according to German law.

2. However, entry in the public register of the home state is required. The law of Holland demands the branding of a mark of pledge upon the boat. As to the German law, see §§ 1260-1271, Civil Code.

II. *The rule is subject to a number of exceptions.*

1. Such pledges as are permitted by the law of the place where the ship happens to be, will be valid, provided : —

- (a) they are entered in the ship's papers, and
- (b) the formalities of the *loi du pavillon* are observed within a certain (reasonable) period.

Ships are immovables only by a fiction ; in truth, they are of a very movable nature. If the *lex patriæ* were exclusively controlling, commerce would be endangered. The interests of the state of sojourn and that of the ordinary creditors would be unnecessarily thwarted.

2. But a mortgage will not be considered valid if made in a manner wholly strange to the law of the place of sojourn, *e.g.* orally or by an informal writing (Seuffert's Archives, xxxi, No. 195 ; Imp. Ct., xlv, p. 279).

3. The same is true where the *loi du pavillon* forbids a mortgage to be made outside the home port unless in accordance with certain formalities.

In America and England

Mortgages over British ships are regulated by 17 and 18 Vict. c. 104, §§ 76–80, and the Merchant Shipping Act of 1894. A registered owner who wishes to mortgage his ship at any place out of the country of the port of registry may apply to the registrar, who shall give him a certificate of mortgage. Every mortgage made under authority of this certificate is indorsed upon it by a registrar or British consular officer, and the mortgages rank according to the date of indorsation. These provisions amply protect mortgagees of British ships in foreign ports.

Bottomry bonds, *i.e.* hypothecations of the ship or of the cargo, are ruled by the law of the flag (*Lloyd v. Guilbert*, 1865, L. R. 1 Q. B. 115 ; *The Gaetano*, 1882, L. R. 7 P. D. 137). These cases hold that the law of the flag determines the authority of the master to bind his owners by a pledge of the ship. In the former case it was said that "reason and convenience" were in favor of this rule "rather than that it should vary according to the law of the port in which the ship may happen for the time to be."

A contrary doctrine was laid down in Louisiana. Several English ships, mortgaged in England, without transfer of possession (which is valid in England), were attached in New Orleans by creditors of the mortgagor. It was held that the Louisiana law, by which no title as against creditors is given without transfer of possession, was applicable (*Malpica v. McKown*, 1 La. R. 248).

As between the several States of the Union, a ship at sea is presumed to belong to the State in which it is registered ; and

hence, where an insolvent in Massachusetts assigned a vessel at sea, registered in that State, by an assignment valid in that State, but void in New York, the assignment was held good as against a New York creditor, who attached the vessel after her arrival in New York (*Crapo v. Kelly*, 16 Wal. 610; accord, *Koster v. Merritt*, 32 Conn. 246; *Moore v. Willett*, 35 Barb. 663).

§ 203. Affreightment and Average.

v. Bar, ii, p. 219.

Heck, *Das Recht der grossen Havarei*.

I. *Contracts of affreightment are governed by the usual rules of the Law of Obligations.*

The law of the country in the business language of which the documents signed by the parties are expressed, will usually be found applicable. It will generally coincide with the law of the seat of the company or firm with which the contract of affreightment is made. It is unsound to take, as an *exclusive* guide, the law of the place of destination (Imp. Ct., ix, p. 51), especially as this is often fixed later by telegram sent after the ship to some port of call.

II. *Provisions as to average loss are part of the law of carriage.*

1. Here, too, the law of the point of destination has been applied frequently by maritime usage. In the Middle Ages, this was connected with the fact that goods were sent to factories subject to the same law as the consignor. Later it was again adopted, because the "*dispatcheurs*," or adjusters of the loss, were more familiar with their own law, which was that of the port of destination. Another view applies the law of the flag, and this is favored by Lyon-Caen. The Congress of Antwerp proposed the following rule:—

"Le règlement des avaries se fait d'après la loi du port, où le chargement se délivre."

2. According to this, the law which governs would be of the port at which the cargo is unloaded. This need not be the port of destination at all. We are thus leaving the question to chance. It is therefore best not to make a concrete rule at all. The intention of the parties, express or implied, should govern, and only

when there are no reasons for applying the law of the flag, or another system, should this standard be adopted.

III. *The legal powers of the captain are determined (upon principle) by the national law of the owner.*

1. The Congress of Antwerp refers this question absolutely to the national law of the owner:—

“Les pouvoirs du capitaine pour pourvoir aux besoins du navire, le vendre, l’hypothéquer, contracter un emprunt à la grosse, sont déterminés par la loi du pavillon, sauf pour lui à se conformer quant à la forme de ces actes, soit à cette loi, soit à celle du lieu du contrat.”

In favor of this solution it may be said that the flag in itself serves to refer third parties to the national law.

2. The rule will not apply if the third parties knew or should have known the limitations upon the powers of the captain.

In America and England

As stated by the author, contracts of affreightment are subject to the general rules applicable to contracts. The *lex loci contractus* is therefore frequently taken as the standard, being the system of law “with a view to which” the parties contracted. In the case of *Liverpool S. Co. v. Phenix Ins. Co.*, 129 U.S. 397, 458, the court said, “The fact that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in sterling currency, does not make the contract an English contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage.” Accord, *O’Reagan v. Cunard S. Co.*, 160 Mass. 356; *The Carib Prince*, 63 Fed. Rep. 266. As an indication that the language in which the contract is written will be taken as an element in determining the intention of the parties, see *The Industrie*, 1894, P. (C. A.) 58.

In support of the doctrine as stated under II, *supra*, see *National Board v. Melchers*, 45 Fed. Rep. 643; *Phillimore*, iv, p. 594.

In support of the rule as stated at III, *supra*, see *The Gaetano*, 1882, L. R. 7 P. D. 137; *Lloyd v. Guilbert*, L. R. 1 Q. B. 115; *The August*, 1891, P. (C. A.) 328.

§ 204. Collisions in Harbors and on the High Seas.

v. Bar, ii, pp. 208 *et seq.*

Buzzati, *L'urto di navi in mare* (Padua, 1889).

R. Prien, *Der Zusammenstoss von Schiffen aus den Gesichtspunkten der Schiffsbewegung, des Strassenrechts und der Haftpflicht aus Schiffskollisionen nach den Gesetzgebungen des Erdballs. Eine nautisch-juristische Studie* (1896). Further authorities are cited in this work at p. 2.

De Paepé, "*De la compétence à l'égard des étrangers dans les affaires maritimes et de la loi applicable à l'abordage*," *Revue de dr. i.*, 2 Series, iii, p. 507.

I. *Claims arising out of collisions (Abordage, Zusammenstoss) in harbors or in territorial waters are determined according to the law of the place where the damage was done. This is the doctrine which prevails in most countries as we are dealing here with torts or quasi-torts.*

1. Territorial waters are those which can be controlled by the coast state by means of its shore batteries. This is reckoned usually as three marine miles from low water tide (*la laisse de la basse marée*). The Institute proposed extending the limit to six miles, but diplomatic negotiations upon the point have not yet reached any practical result.

2. The rule as stated was expressed by the Antwerp Congress of 1885 in the following terms (*Actes*, p. 145, Question 60):—

"L'abordage dans les ports, fleuves et autres eaux intérieures est réglé par la loi du lieu où il se produit."

Certain systems of law have set up presumptions as to the fault of one ship or another, *e.g.* where the one is in motion and the other at anchor, or where the one is a steamer and the other a sailing vessel. These are to be treated as part of the substantive law of the case and are also subject to the *lex loci actus* (German Sup. Ct. Comm., xxiv, p. 83).

II. *Where the collision occurs on the high seas, the ordinary rules upon torts are not applicable, as there is no sovereignty over the place where the act was done.*

1. To apply the *lex fori* seems arbitrary, yet it is in fact often applied, as for instance under American practice (Moore notes to Dicey, p. 670).

2. Lyon-Caen (*Journal*, ix, p. 600) declares the common law of all nations authoritative here; the effect of this is that reparation will be granted only by reason of the *culpa* of some person.

3. It has also been said that the national law of both ships should be combined. Then, if they are of different nationality, no greater obligation can be imposed upon the defendant than his law imposes, and the claimant will receive no higher reparation than his national law would grant. This idea is expressed by the Antwerp Congress of 1885 as follows (*Actes*, p. 145):—

"L'abordage en pleine mer entre deux navires de même nationalité est réglé par la loi nationale. Si les navires sont de nationalité différente, chacun est obligé dans la limite de la loi de son pavillon et ne peut recevoir plus que cette loi lui attribue."

The Institute also favored this rule. It has been said that it is not always easy to discover the authoritative law, as, for example, where a collision occurs by night or in a fog, and the damaging vessel moves off quickly. For this reason the matter of making claim and commencing action has been stated to be satisfied if the laws as to periods and formalities, either of the damaging or of the damaged vessel, or of the nearest port of safety have been observed. It has even been said (*Journal*, ix, p. 604), that in view of the difficulty of establishing nationality in some cases, any period for making claim which is in accordance with natural justice will suffice. But this is too indefinite.

The Congress of Antwerp set up the following rule as to the periods and formalities for making claim and beginning action (*Actes*, p. 146):—

"Si l'abordage a eu lieu en mer le capitaine conserve ces droits en réclamant dans les formes et délais prescrits par la loi de son pavillon, par celle du navire abordeur, ou par celle du premier port de relâche."

III. *Claims for salvage and assistance are subject to different systems according to each case.*

1. If the salvage has occurred in territorial waters, the *lex loci actus* will apply, because the obligation is quasi-contractual. See § 127, *supra*.

2. If it occurs on the high seas, this solution will fail. The solution advanced to take its place is the national law of the salvor, a standard approved by the Antwerp Congress:—

"L'assistance en mer est rémunérée d'après la loi de l'assistant."

In support of this rule it is urged that a ship in distress is legally and physically dependent upon its rescuer, and in effect becomes an adjunct to the latter.

In America and England

"In case of collision on the high seas between ships of different nationalities, the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted, governs (The Belgenland, 114 U.S. 355, 369; *In re State Steamship Co.*, 60 Fed. Rep. 1018). This rule is subject to two qualifications: (1) Persons in charge of either ship would not be open to blame for following sailing directions and rules of navigation prescribed by their own government (The Scotia, 14 Wall. 170, 184). (2) If the maritime law, as administered by the nations to which the ships respectively belong, is the same in respect of a particular matter, it will, if duly proved, be followed in respect of such matter, though it differ from the maritime law as understood in the country of the litigation (The Scotland, 105 U.S. 24, 31)." — Moore's notes to Dicey, p. 670.

The English decisions also favor the *lex fori* (The Leon, 1881, 6 P. D. 148); and even in the case of collisions in foreign territorial waters, the law of England will not give damages unless both the foreign and English law concur in holding damages to be due (Abbott on Shipping, 12th ed., p. 579; The Halley, 1868, L. R., C. P. 193). But the American cases do not go to this extreme; they apply the *lex loci delicti* (Geoghegan v. Atlas S.S. Co., 22 N.Y. Supp. 749; Robinson v. Nav. Co., 73 Fed. 883).

NOTES

The laws relating to collisions vary greatly.

1. According to the Roman law, the principles of the *lex Aquilia* were applied: a collision resulting from negligence made the guilty party liable for damage; others were considered accidental.

2. In the Middle Ages views diverged:—

- (a) In the *Consolato del mare* of Barcelona, the Roman law was retained.
- (b) According to the laws of the countries washed by the ocean, the North Sea and the Baltic (law of Oléron), it was provided that the loss resulting from an innocent collision should fall equally upon the cargoes of both vessels. This rule was applied also where the cause of the collision could not be established.

3. At the present time the following groups may be distinguished (H. Rolin, "*L'abordage*," Brussels, 1899) :—

- (a) The group of the Roman law (Spain, Brazil, Mexico, Germany, and Italy). See, for example, §§ 734-739, especially 735.
- (b) The group of oceanic law ("*le droit de l'Océan*"). Here an apportionment of the damage is followed in part. To this group belong England and France. If both sides were guilty, the damage is apportioned :—
 - (aa) in England equally ;
 - (bb) in France in accordance with the greater or less degree of guilt.

In each case it must be determined whether the rules of navigation, as internationally agreed upon, have been observed. This is especially so where the cause of the collision cannot be determined ; also where there was negligence, but not that of the crew of either vessel, *e.g.* that of an obligatory pilot for which the owner would not be responsible.

§ 205. Contracts against Perils of the Sea.

v. Bar, ii, p. 226.

I. *Contracts of insurance against perils of the sea are subject to the usual rules laid down under International Civil Law, influenced, of course, by the peculiarities of Maritime Law.*

1. The law of the seat of the insurance company controls.

2. A contractual subjection to a particular system of law may be deduced from the language and technical expressions used, where the parties had freedom to contract.

II. *The insurer must submit to an adjustment of the average also as against himself.*

It follows that an adjustment may often be made under a system of law having nothing to do with the insurance contract.

III. *The Congress of Antwerp agreed almost unanimously upon the following proposition :—*

" A l'exception du règlement des avaries communes pour lesquelles ies assureurs sont censés accepter la loi qui régit les assurés, les contestations relatives au contrat d'assurance maritime doivent pour les cas non prévus par la police, être tranchées d'après la loi, les conditions et les usages du pays auquel les parties ont emprunté cette police."

IV. *The Institute has also elaborated a uniform law in regard to marine insurance (Annuaire, viii, p. 125).*

APPENDICES

I

TREATY OF THE HAGUE INTERNATIONAL CONFERENCES TO REGULATE THE CONFLICT OF LAWS IN REGARD TO MARRIAGE

Original Text

Désirant établir des dispositions communes pour régler les conflits de lois en matière de mariage . . .

. . . sont convenus des dispositions suivantes : —

Art. 1

Le droit de contracter mariage est réglé par la loi nationale de chacun des futurs époux, à moins qu'une disposition de cette loi ne se réfère expressément à une autre loi.

Art. 2

La loi du lieu de la célébration peut interdire le mariage des étrangers qui serait contraire à ses dispositions concernant : —

1°. les degrés de parenté ou d'alliance pour lesquels il y a une prohibition absolue ;

2°. la prohibition absolue de se marier, édictée contre les coupables de l'adultère à raison duquel le mariage de l'un d'eux a été dissous ;

3°. la prohibition absolue de se marier, édictée contre des personnes condamnées pour avoir de concert attenté à la vie du conjoint de l'une d'elles.

Le mariage célébré contrairement à une des prohibitions mentionnées ci-dessus ne sera pas frappé de nullité,

Translation

In order to establish uniform provisions to regulate the conflicts of law in regard to marriage . . .

[here follow formal parts of the treaty]
. . . the following provisions are agreed upon : —

Art. 1

The right of contracting marriage is determined by the national law of each of the parties intending to be married, unless such national law refers expressly to some other law.

Art. 2

The law of the place of celebration may prohibit the marriage of aliens if their marriage would be contrary to its own laws regarding : —

1st. prohibited degrees of relationship, for which there is an absolute prohibition ;

2d. absolute prohibition to marry declared against parties guilty of adultery, for which the marriage of one of them has been dissolved ;

3d. absolute prohibition to intermarry declared against persons condemned for having attempted to murder the husband or wife of one of the parties.

A marriage performed contrary to one of the above-mentioned prohibitions shall not be void, provided it

pourvu qu'il soit valable d'après la loi indiquée par l'article 1^{er}.

Sous la réserve de l'application du premier alinéa de l'article 6 de la présente Convention, aucun État contractant ne s'oblige à faire célébrer un mariage qui, à raison d'un mariage antérieur ou d'un obstacle d'ordre religieux, serait contraire à ses lois. La violation d'un empêchement de cette nature ne pourrait pas entraîner la nullité du mariage dans les pays autres que celui où le mariage a été célébré.

Art. 3

La loi du lieu de la célébration peut permettre le mariage des étrangers nonobstant les prohibitions de la loi indiquée par l'article 1^{er}, lorsque ces prohibitions sont exclusivement fondées sur les motifs d'ordre religieux.

Les autres États ont le droit de ne pas reconnaître comme valable le mariage célébré dans ces circonstances.

Art. 4

Les étrangers doivent, pour se marier, établir qu'ils remplissent les conditions nécessaires d'après la loi indiquée par l'article 1^{er}.

Cette justification se fera, soit par un certificat des agents diplomatiques ou consulaires du pays des contractants, soit par tout autre mode de preuve, pourvu que les conventions internationales ou les autorités du pays de la célébration reconnaissent la justification comme suffisante.

Art. 5

Sera reconnu partout comme valable, quant à la forme, le mariage célébré suivant la loi du pays où il a eu lieu.

would be valid according to the law referred to in Art. 1.

Subject to the application of Par. 1 of Art. 6 of the present Convention, none of the contracting Powers bind themselves to authorize the solemnization of a marriage, which by reason of a prior marriage, or an obstacle of a religious character, would contravene its laws. The violation of an impediment of this nature does not render such a marriage void, except in countries other than that in which the marriage was celebrated.

Art. 3

The law of the place of celebration may permit the marriage of aliens notwithstanding the prohibitions of law mentioned in Art. 1, when these are exclusively founded on reasons of a religious character.

The other Powers may refuse to recognize the validity of a marriage performed under these circumstances.

Art. 4

Aliens desiring to marry must prove that they fulfil the conditions necessary to their marriage according to the system of law indicated by Art. 1.

This justification must be made either by a certificate delivered by a diplomatic or consular agent duly authorized by the country to which the party belongs, or by any other means of proof deemed sufficient by international treaty or by the authorities of the country of celebration.

Art. 5

A marriage solemnized in accordance with the law of the place of celebration shall be, as regards its form, everywhere considered a valid marriage.

Il est toutefois entendu que les pays dont la législation exige une célébration religieuse, pourront ne pas reconnaître comme valables les mariages contractés par leurs nationaux à l'étranger sans que cette prescription ait été observée.

Les dispositions de la loi nationale, en matière de publications, devront être respectées; mais le défaut de ces publications ne pourra pas entraîner la nullité du mariage dans les pays autres que celui dont la loi aurait été violée.

Une copie authentique de l'acte de mariage sera transmise aux autorités du pays de chacun des époux.

It is nevertheless understood that countries whose legislation requires a religious celebration shall be free to consider as invalid a marriage entered into by their subjects abroad without observing this requirement.

The requirements of the national law as to publications must be fulfilled; but the omission of these publications will not render the marriage void in countries other than those whose laws have been disregarded.

An authentic copy of the marriage act shall be sent to the authorities of the country of each of the spouses.

Art. 6

Sera reconnu partout comme valable, quant à la forme, le mariage célébré devant un agent diplomatique ou consulaire, conformément à sa législation, si aucune des parties contractantes n'est ressortissante de l'État où le mariage a été célébré et si cet État ne s'y oppose pas. Il ne peut pas s'y opposer quand il s'agit d'un mariage qui, à raison d'un mariage antérieur ou d'un obstacle d'ordre religieux, serait contraire à ses lois.

La réserve du second alinéa de l'article 5 est applicable aux mariages diplomatiques et consulaires.

Art. 6

A marriage solemnized before a diplomatic or consular agent in conformity with the laws of his country shall be everywhere recognized as valid as regards its form, provided neither of the contracting parties be a subject of the Power where the marriage is solemnized and provided this Power does not object to it. It will not be free to object to it when contravening its laws on account of a prior marriage or an obstacle of a religious character.

The reservation of Par. 2, Art. 5 is applicable to diplomatic and consular marriages.

Art. 7

Le mariage, nul quant à la forme dans les pays où il a été célébré, pourra néanmoins être reconnu comme valable dans les autres pays, si la forme prescrite par la loi nationale de chacune des parties a été observée.

Art. 7

A marriage void as regards form in the country where it was celebrated shall be considered valid in the other countries if the form prescribed by the national law of each of the parties has been observed.

Art. 8

La présente Convention ne s'applique qu'aux mariages célébrés sur le territoire des États contractants entre per-

Art. 8

The present Convention applies only to marriages solemnized upon the territory of the contracting Powers be-

sonnes dont une au moins est ressortissante d'un de ces États.

Aucun État ne s'oblige, par la présente Convention, à appliquer une loi qui ne serait pas celle d'un État contractant.

Art. 9

La présente Convention, qui ne s'applique qu'aux territoires européens des États contractants, sera ratifiée et les ratifications en seront déposées à La Haye dès que la majorité des Hautes parties contractantes sera en mesure de le faire.

Il sera dressé de ce dépôt un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à chacun des États contractants.

Art. 10

Les États non signataires qui ont été représentés à la troisième Conférence de Droit International Privé sont admis à adhérer purement et simplement à la présente Convention.

L'État qui désire adhérer notifiera, au plus tard le 31 décembre, 1904, son intention par un acte qui sera déposé dans les archives du Gouvernement des Pays-Bas. Celui-ci en enverra une copie, certifiée conforme, par la voie diplomatique de chacun des États contractants.

Art. 11

La présente Convention entrera en vigueur le 60^{ième} jour à partir du dépôt des ratifications ou de la date de la notification des adhésions.

Art. 12

La présente Convention aura une durée de cinq ans à partir de la date du dépôt des ratifications.

tween persons, one of whom at least is a subject of one of these Powers.

None of the Powers obligates itself by the present Convention to apply a law which is not that of one of the contracting Powers.

Art. 9

The present Convention applies only to the European territories of the contracting Powers. It shall be deemed ratified by the deposit at The Hague of the ratifications of a majority of the High Contracting Parties.

A *procès-verbal* of this deposit shall be prepared and a certificated copy of it shall be forwarded by diplomatic means to each of the contracting Powers.

Art. 10

The non-signatory States which were represented at the Third Conference upon International Private Law shall be admitted to join the present Convention without formality.

A State which desires to join shall give notice of its intention not later than the 31st day of December, 1904, by an Act which shall be deposited in the archives of the Government of the Netherlands. The latter shall send a duly certified copy of it by diplomatic means to each of the contracting Powers.

Art. 11

The present Convention shall go into effect 60 days after the deposit of ratifications or the date of notification of joining.

Art. 12

The present Convention shall continue in effect for five years from the date of the deposit of ratifications.

Ce terme commencera à courir de cette date, même pour les États qui auront fait le dépôt après cette date ou qui auraient adhéré plus tard.

La Convention sera renouvelée tacitement de cinq ans en cinq ans, sauf dénonciation.

La dénonciation devra être notifiée, au moins six mois avant l'expiration du terme visé aux alinéas précédents, au Gouvernement des Pays-Bas, qui en donnera connaissance à tous les autres États contractants.

La dénonciation ne produira son effet qu'à l'égard de l'État qui l'aura notifiée. La Convention restera exécutoire pour les autres États.

This term shall commence to run from that date, even for the Powers which shall have made the deposit after that date, or which shall have joined later.

The Convention shall be deemed tacitly renewed every five years unless terminated.

Notice of renunciation shall be given at least six months before expiration of the period mentioned in the preceding paragraphs to the Government of the Netherlands, which shall give notice of it to all other contracting Powers.

A renunciation shall be effective only in respect of the Powers which shall have given notice of it. The Convention shall remain in force between the other Powers.

II

TREATY OF THE HAGUE INTERNATIONAL CONFERENCES TO REGULATE THE CONFLICT OF LAWS AND JURISDICTIONS IN REGARD TO DIVORCE AND SEPARATION

Original Text

Désirant établir des dispositions communes pour régler les conflits de lois et de juridictions en matière de divorce et de séparation de corps. . . .

. . . sont convenu les dispositions suivantes :—

Art. 1

Les époux ne peuvent former une demande en divorce que si leur loi nationale et la loi du lieu où la demande est formée admettent le divorce l'une et l'autre.

Il en est de même de la séparation de corps.

Art. 2

Le divorce ne peut être demandé que si, dans le cas dont il s'agit, le divorce est admis à la fois par la loi nationale des époux et par la loi du lieu où la demande est formée.

Il en est de même de la séparation de corps.

Art. 3

Nonobstant les dispositions des articles 1^{er} et 2, la loi nationale sera seule observée si la loi du lieu où la demande est formée le prescrit ou le permet.

Art. 4

La loi nationale indiquée par les articles précédents ne peut être invoquée pour donner à un fait qui s'est passé

Translation

In order to establish uniform provisions to regulate the conflict of laws and of jurisdictions in regard to divorce and separation

[here follow formal parts of the treaty]

. . . the following provisions are agreed upon :—

Art. 1

Married persons may apply for a divorce provided their national law and the law of the place where the application is made both admit of divorce.

This applies also to separation.

Art. 2

The divorce may be granted only for grounds sufficient to obtain the divorce both by the national law of the spouses and by the law of the place where the application is made.

This applies also to separation.

Art. 3

Notwithstanding the provisions of Arts. 1 and 2, the national law shall be exclusively observed if the law of the place where the application is made so prescribes or permits.

Art. 4

The national law may not be invoked as provided in the preceding articles where it would result in construing, as

alors que les époux ou l'un d'eux étaient d'une autre nationalité, le caractère d'une cause de divorce ou de séparation de corps.

Art. 5

La demande en divorce ou en séparation de corps peut être formée : —

1°. devant la juridiction compétente d'après la loi nationale des époux ;

2°. devant la juridiction compétente du lieu où les époux sont domiciliés. Si, d'après leur législation nationale, les époux n'ont pas le même domicile, la juridiction compétente est celle du domicile du défendeur. Dans le cas d'abandon et dans le cas d'un changement de domicile opéré après que la cause de divorce ou de séparation est intervenue, la demande peut aussi être formée devant la juridiction compétente du dernier domicile commun. — Toutefois, la juridiction nationale est réservée dans la mesure où cette juridiction est seule compétente pour la demande en divorce ou en séparation de corps. La juridiction étrangère reste compétente pour un mariage qui ne peut donner lieu à une demande en divorce ou en séparation de corps devant la juridiction nationale compétente.

Art. 6

Dans le cas où des époux ne sont pas autorisés à former une demande en divorce ou en séparation de corps dans le pays où ils sont domiciliés, ils peuvent néanmoins l'un et l'autre s'adresser à la juridiction compétente de ce pays pour solliciter les mesures provisoires que prévoit sa législation en vue de la cessation de la vie en commun. Ces mesures seront maintenues si, dans le délai d'un an, elles sont confirmées par la juridiction nationale ; elles ne dureront pas plus longtemps que ne le permet la loi du domicile.

a ground for divorce or separation, a fact which occurred when the spouses or either of them were of another nationality.

Art. 5

An application for divorce or separation may be made : —

1st. before a jurisdiction competent according to the national law of the spouses ;

2d. before a jurisdiction competent according to the law of the place where the spouses are domiciled. Where the spouses have not the same domicile according to their national law, the competent jurisdiction shall be that of the defendant. In case of desertion or of a change of domicile after the ground for divorce or separation arose, the application may be made before the competent jurisdiction of the last common domicile. — Provided, however, that the national jurisdiction shall be reserved to the extent that this jurisdiction is considered exclusively competent for an application for divorce or separation. The foreign jurisdiction remains competent for a marriage which is not subject to divorce or separation before the competent national jurisdiction.

Art. 6

Where the spouses cannot apply for divorce or separation in the country where they are domiciled, either of them may nevertheless apply to the competent jurisdiction of that country for the granting of such provisional relief as its legislation provides in the case of a cessation of communal life. Such relief shall be continued if confirmed by the national jurisdiction within one year ; it shall not continue for longer than the domiciliary law permits.

Art. 7

Le divorce et la séparation de corps, prononcés par un tribunal compétent aux termes de l'article 5, seront reconnus partout, sous la condition que les clauses de la présente Convention aient été observées et que, dans le cas où la décision aurait été rendue par défaut, le défendeur ait été cité conformément aux dispositions spéciales exigées par sa loi nationale pour reconnaître les jugements étrangers.

Seront reconnus également partout le divorce et la séparation de corps prononcés par une juridiction administrative, si la loi de chacun des époux reconnaît ce divorce et cette séparation.

Art. 8

Si les époux n'ont pas la même nationalité, leur dernière législation commune devra, pour l'application des articles précédents, être considérée comme leur loi nationale.

Art. 9

La présente Convention ne s'applique qu'aux demandes en divorce ou en séparation de corps formées dans l'un des États contractants, si l'un des plaideurs au moins est le ressortissant d'un de ces États.

Aucun État ne s'oblige, par la présente Convention, à appliquer une loi qui ne serait pas celle d'un État contractant.

Arts. 10, 11, 12, and 13 of this treaty are identical with Arts. 9, 10, 11, and 12 respectively, of the treaty dealing with Marriage (Appendix I, *supra*).

Art. 7

A divorce or separation decreed by a court, competent according to the terms of Art. 5, shall be recognized everywhere, provided the provisions of the present Convention have been observed and, in case the decision has been rendered by default, the defendant has been cited in accordance with the special provisions of his national law for the recognition of foreign judgments.

A divorce or separation decreed by an administrative jurisdiction shall likewise be recognized everywhere if the law of each of the spouses recognizes such a divorce or separation.

Art. 8

If the spouses are not of the same nationality, the system of law last common to each shall be considered their national law.

Art. 9

The present Convention applies only to applications for divorce or separation made in one of the contracting Powers where at least one of the parties is a subject of one of these Powers.

No Power shall be deemed compelled by the present Convention to apply a law which is not that of one of the contracting Powers.

III

TREATY OF THE HAGUE INTERNATIONAL CONFERENCES TO REGULATE THE CONFLICT OF LAWS AND JURISDICTIONS IN REGARD TO GUARDIANSHIP OF MINORS

Original Text

Désirant établir des dispositions communes pour régler la tutelle des mineurs . . .

. . . sont convenus les dispositions suivantes :—

Art. 1

La tutelle d'un mineur est réglée par sa loi nationale.

Art. 2

Si la loi nationale n'organise pas la tutelle dans le pays du mineur en vue du cas où celui-ci aurait sa résidence habituelle à l'étranger, l'agent diplomatique ou consulaire autorisé par la loi de l'État dont le mineur est le ressortissant pourra y pourvoir, conformément à la loi, de cet État si l'État de la résidence habituelle du mineur ne s'y oppose pas.

Art. 3

Toutefois, la tutelle du mineur ayant sa résidence habituelle à l'étranger s'établit et s'exerce conformément à la loi du lieu, si elle n'est pas ou si elle ne peut pas être constituée conformément aux dispositions de l'article 1^{er} ou de l'article 2.

Translation

In order to establish uniform provisions to regulate the guardianship of minors . . .

[here follow formal parts of the treaty]

. . . the following provisions are agreed upon :—

Art. 1

The guardianship of a minor shall be governed by his national law.

Art. 2

If the national law does not institute a guardianship in the country of the minor by reason of having his permanent residence abroad, the diplomatic or consular agent authorized by the law of the State of which the minor is a subject shall be deemed empowered so to do, pursuant to the law of that State, provided the law of the State of permanent residence does not oppose it.

Art. 3

However, the guardianship of a minor having his permanent residence in a foreign country shall be instituted and administered according to the law of that place, provided it is not, or can not be created pursuant to the provisions of Art. 1 or of Art. 2.

Art. 4

L'existence de la tutelle établie conformément à la disposition de l'article 3 n'empêche pas de constituer une nouvelle tutelle par application de l'article 1^{er} ou de l'article 2.

Il sera, le plus tôt possible, donné information de ce fait au Gouvernement de l'État où la tutelle a d'abord été organisée. Ce Gouvernement en informera, soit l'autorité qui aurait institué la tutelle, soit, si une telle autorité n'existe pas, le tuteur lui-même.

La législation de l'État où l'ancienne tutelle était organisée décide à quel moment cette tutelle cesse dans le cas prévu par le présent article.

Art. 5

Dans tous les cas, la tutelle s'ouvre et prend fin aux époques et pour les causes déterminées par la loi nationale du mineur.

Art. 6

L'administration tutélaire s'étend à la personne et à l'ensemble des biens du mineur, quel que soit le lieu de leur situation.

Cette règle peut recevoir exception quant aux immeubles placés par la loi de leur situation sous un régime foncier spécial.

Art. 7

En attendant l'organisation de la tutelle, ainsi que dans tous les cas d'urgence, les mesures nécessaires pour la protection de la personne et des intérêts d'un mineur étranger pourront être prises par les autorités locales.

Art. 4

The existence of a guardianship created pursuant to Art. 3 shall not prevent the instituting of a new guardianship according to Art. 1 or Art. 2.

Information of this fact shall be given as soon as possible to the Government of the State where the guardianship was first created. This Government shall then inform the authority which instituted the guardianship, or if such an authority does not exist, the guardian himself.

The laws of the State where the guardianship was originally created shall decide at what moment this guardianship ceases in the case mentioned in this article.

Art. 5

A guardianship shall, in every case, begin and terminate at the time and for the causes provided by the national law of the minor.

Art. 6

The administration of the guardianship extends to the person and over all the property of the minor, wherever it is situated.

This rule does not apply to immovables subjected by the law of their situation to a special system of law applicable to land.

Art. 7

Measures necessary for the protection of the person and interests of an alien minor may be taken by the local authorities, pending the creation of a guardianship and in all cases of urgency.

Art. 8

Les autorités d'un État sur le territoire duquel se trouvera un mineur étranger dont il importera d'établir la tutelle, informeront de cette situation, dès qu'elle leur sera connue, les autorités de l'État dont le mineur est le ressortissant.

Les autorités ainsi informées feront connaître le plus tôt possible aux autorités qui auront donné l'avis si la tutelle a été ou si elle sera établie.

Art. 9

La présente Convention ne s'applique qu'à la tutelle des mineurs ressortissants d'un des États contractants, qui ont leur résidence habituelle sur le territoire d'un de ces États.

Toutefois, les articles 7 et 8 de la présente Convention s'appliquent à tous les mineurs ressortissants des États contractants.

Arts. 10, 11, 12, and 13 of this treaty are identical with Arts. 9, 10, 11, and 12 respectively, of the treaty on Marriage (*Appendix I, supra*).

Art. 8

Where it is necessary to create a guardianship for an alien minor sojourning within the territory of a State, the authorities of that State shall give notice of this situation to the State of which the minor is a subject, as soon as it becomes known to them.

The authorities thus informed shall indicate as soon as possible, to the authorities who have given the notice, whether a guardianship has been or will be created.

Art. 9

The present Convention applies only to the guardianship of minors who are subjects of one of the contracting Powers having their permanent residence within the territory of another of these Powers.

However, Arts. 7 and 8 of the present Convention shall apply to all minors who are subjects of the contracting Powers.

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